

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT

vs.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT

vs.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT

vs.

COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from U. S. D. C., Southern District of New York in American Broadcasting Company Case No. 52-24.....	1	1
Stipulation for filing amended complaint.....	1	1
Amended complaint.....	2	2
Exhibit A—Description of "Stop the Music" program..	13	8
Letter from Alfred McCormack to Judge Leibell dated October 14, 1952.....	20	11
280577-53-1	1	

Record from U. S. D. C., Southern District of New York in American Broadcasting Company Case No. 52-24—Con.		Original	Print
Affidavit of G. B. Zorbaugh.....		23	12
Exhibit A—Complaint in Clef, Inc. vs. Peoria Broad- casting Company filed in Circuit Court of Peoria County.....		29	16
Exhibit A—Mušico Score card.....		36	21
Decree in Clef, Inc. vs. Peoria Broadcasting Company.....		37	22
Exhibit B-1—Letter from Donald J. Finlayson to Solicitor, Post Office Department, dated February 24, 1950.....		39	24
Exhibit B-2—Letter from Solicitor to Donald J. Finlayson dated March 2, 1950.....		41	25
Exhibit C-1—Letter from G. B. Zorbaugh to Solicitor dated April 28, 1949.....		42	26
Exhibit C-2—Letter from Solicitor to G. B. Zorbaugh dated May 9, 1949.....		43	27
Exhibit D—Letter from Chairman, Federal Com- munications Commission to Burton K. Wheeler, dated December 30, 1943, with enclosures.....		44	27
Exhibits E-1 through J-2—Correspondence between James Lawrence Fly, Chairman of the Federal Com- munications Commission and the Attorney General.....		48	30
Exhibit E-1.....		48	30
Exhibit E-2.....		62	41
Exhibit F-1.....		64	42
Exhibit F-2.....		70	46
Exhibit G-1.....		72	46
Exhibit G-2.....		76	48
Exhibit H-1.....		78	49
Exhibit H-2.....		82	52
Exhibit I-1.....		83	52
Exhibit I-2.....		84	53
Exhibit I-3.....		86	53
Exhibit J-1.....		106	62
Exhibit J-2.....		107	63
Exhibit K—Transcription of a typical broadcast of "Stop the Music" (Radio) and (Television).....		108	63
Notice of motion for summary judgment.....		160	90
Notice of motion to dismiss etc.....		164	90
Motions to dismiss or in the alternative for summary judgment.....		166	91
Affidavit of Benedict P. Cottone.....		168	92
Exhibits B and C—Letters to the Commission dated April 4, 1940, and April 11, 1940, and en- closures from station WGN.....		173	96
Opinion, Leibell, J. (Consolidated cases).....		195	110
Dissenting opinion, Clark, J. (Consolidated cases).....		238	132
Judgment.....		250	138

INDEX

III

Record from U. S. D. C., Southern District of New York in

American Broadcasting Company Case No. 52-24—Con.	Original	Print
Order allowing appeal.....	259	140
Petition for appeal (Omitted in printing).....	260	
Assignment of errors and prayer for reversal.....	262	141
Order permitting transmission of original documents.....	266	142
Præcipe for record.....	273	143
Record in National Broadcasting Company Case No. 52-37.....	278	145
Stipulation for filing amended complaint.....	278	145
Amended complaint.....	280	146
Exhibit A-1—Notice of proposed rule making.....	296	157
Exhibit A-2—Supplemental notice.....	299	159
Exhibit B—Report and order.....	302	161
Exhibit C—Transcript of broadcast "You Bet Your Life".....	312	171
Exhibit D—Transcript of broadcast "\$64 Question.".....	334	184
Exhibit E—Transcript of broadcast "What's my Name.".....	359	198
Exhibit F—Transcript of broadcast "Double or Nothing.".....	381	210
Notice of motion for summary judgment.....	407	224
Affidavit of Gustav B. Margraf.....	408	224
Exhibit A—Letter from Chairman, Federal Communications Commission to Burton K. Wheeler dated December 30, 1943 and enclosures (Copy) (Omitted in printing).....	415	228
Exhibit B—Letter from Solicitor, Post Office Department, to Samuel I. Rosenman, dated May 3, 1949.....	419	229
Exhibit C-1—Instructions of the Solicitor.....	420	229
Exhibit C-2—Contest Rules.....	421	230
Exhibits D-1 and D-2—Letter from Finlayson to Solicitor and reply, dated February 24, 1950 and March 2, 1950 (Copies) (Omitted in printing).....	422	231
Exhibits E-1 and E-2—Letter from Zorbaugh to Solicitor and reply, dated April 28, 1949 and May 9, 1949 (Copies) (Omitted in printing).....	425	
Exhibit F-1 through F-4 and F-6 through K-2—Correspondence between Chairman Federal Communications Commission and Attorney General (Copies) (Omitted in printing).....	427	231
Exhibit F-5—Press release of the Federal Communications Commission dated February 8, 1940.....	444	231
Exhibit L—Transcript of broadcast "Mu\$ico" (Copy) (Omitted in printing).....	470	231
Notice of motion to strike, etc.....	493	232
Motion to strike and motions to dismiss or in the alternative, for summary judgment.....	495	233
Affidavit of Benedict P. Cottone.....	497	234

	Original	Print
Record in National Broadcasting Company Case—Con.		
Opinion in consolidated cases (Printed side page 195)		
Judgment.....	502	238
Order allowing appeal.....	508	239
Petition for appeal (Omitted in printing).....	510	
Assignment of errors and prayer for reversal.....	512	240
Order permitting transmission of original documents.....	516	242
Præcipe for record.....	523	242
Record in Columbia Broadcasting System Case.....	528	244
Stipulation for filing amended complaint.....	528	244
Amended complaint.....	530	245
Exhibit I—Transcript of broadcast "Sing It Again".....	547	256
Exhibit II—Transcript of broadcast "Hit The Jack-pot".....	572	275
Exhibits III, IV and V—Proceedings before Federal Communications Commission in Docket No. 9113 (Copy) (Omitted in printing).....	582	281
Notice of motion for summary judgment.....	600	282
Affidavit of Max Freund.....	603	282
Exhibit A—Letter from Chairman, Federal Communications Commission to Burton K. Wheeler dated December 30, 1943, and enclosures (Copy) (Omitted in printing).....	610	287
Exhibit B-1—Complaint in Clef, Inc. vs. Peoria Broadcasting Company (Copy) (Omitted in printing).....	614	287
Exhibit B-1—Answer and motion to strike answer in Clef, Inc. vs. Peoria Broadcasting Company.....	621	288
Exhibit B-2—Decree (Copy) (Omitted in printing).....	624	290
Exhibits C-1 and C-2—Letter from Finlayson to Solicitor and reply dated February 24, 1950, and March 2, 1950 (Copies) (Omitted in printing).....	626	290
Exhibits D-1 through F-6—Correspondence between Chairman, Federal Communications Commission and Attorney General (Copies) (Omitted in printing).....	629	290
Exhibits G-1 and G-2—Letter from Zorbaugh to Solicitor and reply dated April 28, 1949 and May 9, 1949 (Copies) (Omitted in printing)....	694	290
Notice of motion to dismiss.....	697	290
Motions to dismiss or in the alternative for summary judgment.....	699	292
Affidavit of Benedict P. Cottone.....	701	293
Opinion in consolidated cases (Printed side page 195)....		
Judgment.....	706	296
Order allowing appeal.....	712	298

INDEX

V

Record in Columbia Broadcasting System Case—Con.	Original	Print
Petition for appeal (Omitted in printing).....	713	
Assignment of errors and prayer for reversal.....	715	299
Order permitting transmission of original documents.....	718	300
Praecepta for record.....	724	301
Statement of points to be relied upon.....	728	303
Stipulation designating parts of the record to be printed.....	734	304
Order noting probable jurisdiction.....	741	307

1 In United States District Court, Southern District of
New York

Civil Action No. 52-24

AMERICAN BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COM-
MISSION, DEFENDANTS

[File endorsement omitted.]

Stipulation for Filing Amended Complaint

Filed September 22, 1952

It is hereby stipulated and agreed:

1. Defendants consent to the filing by plaintiff of an amended complaint in the form annexed hereto marked Exhibit A.

2. It appearing that the parties intend to move for summary judgment, for the purpose of such motions (a) all the allegations of fact set forth in the amended complaint in this action shall be taken as admitted by the defendants, and (b) either plaintiff or defendants may rely upon facts set forth in the amended complaints in the companion actions of National Broadcasting Company v. FCC, Civil Action No. 52-37, and Columbia Broadcasting System v. FCC, Civil Action No. 52-38, and upon the affidavits, or any of them, filed in either of said companion actions by either plaintiffs or defendants therein.

Dated September 16, 1952.

CRAVATH, SWAINE & MOORE,
By ALFRED McCORMACK,
Attorneys for Plaintiff,

WILLIAM J. HICKEY,
MYLES J. LANE,
Attorneys for Defendant, United States of America,
DANIEL R. OHLBAUM,
Attorney for Defendant,
Federal Communications Commission.

So ordered September 22, 1952.

EDWARD A. CONGER,
U. S. D. J.

2 In United States District Court

Civil Action No. 52-24

[Title omitted.]

Amended complaint

(Filed September 22, 1952)

Plaintiff, for its amended complaint herein, alleges:

1. This action is brought pursuant to the provisions of Section 402 (a) of the Communications Act of 1934, as amended (47 U. S. C. § 402 (a)), Title 28, U. S. Code (28 U. S. C. §§ 1336, 1398, 2284, 2321-25), and Section 10 of the Administrative Procedure Act (5 U. S. C. § 1009) to enjoin, set aside and annul an order of the Federal Communications Commission (hereinafter referred to as "the Commission") issued August 18, 1949, in proceedings entitled "In the Matter of Promulgation of Rules Governing Broadcast of Lottery Information, Federal Communications Commission, Docket No. 9113" (said order together with the accompanying report being hereinafter sometimes together called the "Order").

2. The Order adopted and promulgated rules designated therein as §§ 3.192, 3.292 and 3.692 (hereinafter sometimes called "the Rules"). The effective date specified in the Order was October

1, 1949. The enforcement of the Rules and the Order was

3 stayed by an order of this Court entered by Judge Simon H. Rifkind on September 23, 1949, pending determination of an application by plaintiff for an interlocutory injunction. On September 21, 1949, the Commission adopted and issued an additional order postponing the effective date of the Rules and Order until at least 30 days after a final decision by the Supreme Court of the United States in this and other pending litigation with respect to such Rules and Order or 30 days after the time within which an appeal to the Supreme Court of the United States may be taken in such litigation has expired without such an appeal being taken.

3. Plaintiff is a corporation organized under the laws of the State of Delaware and has its principal office in the County of New York, State of New York, and in the Southern District thereof.

4. Defendant Federal Communications Commission was created by said Communications Act of 1934 (hereinafter referred to as "the Communications Act") for the purposes of regulating interstate and foreign commerce in communication by wire and radio, of national defense, of promoting safety of life and property through the use of wire and radio communication and of centralizing authority in a single agency.

5. The United States of America is made a defendant in this suit pursuant to the provisions of the Act of June 25, 1948 (28 U. S. C. § 2322), and the Communications Act (47 U. S. C. § 402 (a)).

6. Plaintiff for many years has been, and now is, engaged in the business of broadcasting radio and television programs; it owns directly or indirectly and operates five amplitude modulation (AM) broadcasting stations, five frequency modulation (FM) broadcasting stations and five television (TV) broadcasting stations. It is also engaged in the business of furnishing its network programs to its own stations and to stations affiliated with it, which together total approximately 323 amplitude modulation (AM) broadcasting stations, 75 frequency modulation (FM) broadcasting stations and 75 television (TV) broadcasting stations. Plaintiff's stations and those affiliated with it are known as "the ABC Network." All such stations operate under licenses granted by the Commission pursuant to the Communications Act. Licenses and renewals thereof are granted for periods of three years for AM and FM broadcasting stations and one year for TV broadcasting stations.

7. On or about August 5, 1948, the Commission released a "Notice of Proposed Rule Making" (13 Fed. Reg. 4748) announcing its intention to adopt rules setting forth certain types of programs which the Commission believes are in violation of Section 316 of the Communications Act and specifying that the proposed rules were issued under the authority of Sections 316, 4 (i) and 303 (r) of the Communications Act.

8. Section 316 of the Communications Act having been repealed effective September 1, 1948, by the Act of June 25, 1948, and a similar provision having been inserted in the Criminal Code as Section 1304 thereof, the Commission on or about August 27, 1948, released a "Supplemental Notice of Proposed Rule Making" (13 Fed. Reg. 5075) eliminating said Section 316 as one of the bases upon which the Commission claimed authority to issue the proposed rules and specifying Sections 4 (i), 303 (r), 307 (a), 308 (b) and 309 (a) of the Communications Act as authority for its proposed action.

9. Pursuant to said notices, plaintiff and others filed briefs in opposition to the proposed rules and participated in oral argument at a hearing thereon before the Commission on October 19, 1948, at which hearing the Commission did not present any argument in support of said proposed rules. Nor did the Commission have before it any evidence that programs coming within the terms of the Order were contrary to or adversely affected the public interest, or that the broadcast licensees broadcasting such programs were of bad character or otherwise unfit to hold such

licenses. Furthermore, the Commission made no finding that such programs were contrary to or adversely affected the public interest except in so far as they may violate Section 1304 of the United States Criminal Code.

10. On August 18, 1949, the Commission, acting by four (one dissenting) of its seven members, issued a Report and Order, promulgating and adopting effective October 1, 1949, the following rules:

"LOTTERIES AND GIVE-AWAY PROGRAMS.—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304.)

"(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider

6 that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing

the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

11. Plaintiff has expended substantial sums of money in building up among the public, advertisers and broadcasting stations a valuable reputation and good will for the broadcasting stations it owns and operates and for the programs broadcast by its stations and furnished to affiliated stations for broadcasting by them. From time to time, plaintiff broadcasts programs having as the central feature the conduct of a contest in which prizes are awarded to the successful contestants. Such programs, or some of them, are within the terms of the Rules defining the types of programs which the Commission "will in any event consider" as violations of Section 1304 of the Criminal Code, although none of such programs constitutes, or has been held by any court to constitute, a lottery, gift enterprise or similar scheme in violation of said Section. Such programs have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public. Many persons listen to, view and enjoy such programs although for one reason or another they are not eligible to win a prize. Such programs are highly popular, have contributed substantially to the reputation of and good will of plaintiff's stations and those affiliated with it and have produced substantial revenues and profits for plaintiff.

12. Among such programs which are or may be within the terms of the Rules, and which we are informed and believe the Commission considers as coming within the Rules, are the following:

"Stop The Music" (radio show).

"Stop The Music" (television show).

A description of each of said programs is set forth in Exhibit A annexed hereto.

13. Unless the Order and the Rules be permanently enjoined, annulled and set aside, plaintiff's applications for renewal of existing licenses for broadcasting stations and for any additional permits, licenses or authorizations for the construction or operation of broadcasting stations, and similar applications by broadcasting stations affiliated with plaintiff, will automatically be denied by the Commission if plaintiff and its affiliated stations broadcast such programs after the Order has become effective; and the Commission may also, pursuant to the provisions of Sections 308 and 312 of the Communications Act, revoke prior to expiration the station licenses of some or all of such broadcasting stations.

14. Plaintiff's AM, FM and TV broadcasting stations have an aggregate value of many millions of dollars, and its business of operating such stations has an even greater value because of the good will thereof, all of which values will be destroyed if its licenses for such stations shall not be renewed by the Commission. The other stations of the ABC Network also represent very large investments which will similarly be destroyed if the licenses of such stations shall not be renewed by the Commission. Plaintiff's business of supplying programs to its affiliated stations will likewise be destroyed or greatly damaged if either the licenses of its stations or those of any substantial number of its affiliated stations shall not be renewed by the Commission.

15. If, therefore, the Order shall become effective, plaintiff and its affiliated stations will be forced to discontinue the broadcasting of the aforesaid programs which are or may be within the Rules and plaintiff will be forced to discontinue offering such programs to its affiliated stations for broadcasting. In such event plaintiff will be compelled also to refrain from developing and offering to prospective advertisers new programs of a similar nature; plaintiff will be unable to perform contracts with sponsors of such programs then being broadcast and will be compelled to refrain from entering into additional contracts with sponsors of similar prospective programs; and plaintiff's revenues from sales of time on its own and its affiliated stations will be very greatly reduced. Plaintiff's investments in such programs will be destroyed and its property rights and the good will of the public, of other broadcast stations and of advertisers for plaintiff will be substantially and irreparably affected. In addition, if plaintiff shall be forced to discontinue the aforesaid programs, it will have to develop new or different programs as substitutes therefor and will have to make large outlays of money for that purpose; and, in addition, plaintiff will be required to carry some or all of such new programs on a sustaining or unsponsored basis in order to popularize them and thus make them attractive to advertising sponsors. By reason of the foregoing, plaintiff will suffer irreparable injury unless the order of the Commission shall be set aside.

16. The Order and the Rules are beyond the jurisdiction and authority of the Commission and are illegal and void, because

(a) The Commission is not authorized, either by the Communications Act or otherwise, to adopt rules or to exercise its licensing power, directly or indirectly, so as

(i) to alter or increase the sanctions provided by Congress for violations of Section 1304 of the Criminal Code; or

(ii) to impose sanctions for conduct allegedly in violation of said Section 1304 but not adjudicated as such by any court;

(b) The Commission is required by the Communications Act to grant and withhold licenses according to the standard of public interest, convenience or necessity, and is not authorized by said Act to make a violation of Section 1304 of the Criminal Code, whether or not adjudicated as such, the sole ground for
10 withholding or revoking a license or denying a renewal thereof;

(c) The Order and the Rules are arbitrary, capricious and not in the public interest and constitute an abuse of discretion by the Commission;

(d) The Order and the Rules are erroneous as a matter of law, in that they are based upon an incorrect interpretation by the Commission of Section 1304 of the Criminal Code;

(e) The Order and the Rules are contrary to, and in violation of, Section 326 of the Communications Act, in that they constitute an exercise by the Commission of the power of censorship over radio communications;

(f) The Order and the Rules are contrary to Sections 4 (b) and 9 (a) of the Administrative Procedure Act; and

(g) The Order and the Rules are contrary to Sections 5 (a), 5 (b), 5 (c), 7 (a), 7 (c), 7 (d), 8 (a) and 8 (b) of the Administrative Procedure Act.

17. If the Communications Act authorizes the Commission to make the Order and the Rules, then said Act is contrary to and in violation of the First Amendment to the Constitution of the United States.

18. The Order and the Rules are in violation of the Constitution of the United States in that

(a) They constitute or have the effect of bills of attainder, contrary to Article I, Section 9, Clause 3 thereof;

(b) They deprive plaintiff of property without due process of law, in violation of the Fifth Amendment thereto;

11 (c) They subject plaintiff to punishment for a crime, without a hearing by any court and without trial by jury, in violation of Article III, Section 2, Clause 3 thereof, and the Sixth Amendment thereto.

19. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays:

1. That a court, constituted as required by Sections 2284 and 2325 of the Judicial Code (28 U. S. C. §§ 2284, 2325), be convened and that said Court so constituted and convened shall hear and determine this action;

2. That said Court so constituted and convened shall enter its order granting an interlocutory injunction restraining the enforcement, operation or execution, in whole or in part, of the order

of the Federal Communications Commission adopted August 18, 1949, pending final hearing and determination of this action;

3. That said Court so constituted and convened shall, upon final hearing and determination of this action, enter a decree permanently enjoining, setting aside and annulling said Order of the Commission adopted August 18, 1949, and the Rules adopted thereby; and

4. That plaintiff have such other and further relief as the Court may deem just and equitable.

G. B. ZORBAUGH,
30 Rockefeller Plaza, New York 20, N. Y.,
CRAVATH, SWAINE & MOORE,
15 Broad Street, New York 5, N. Y.,
Attorneys for American Broadcasting Company, Inc.
By ———, A Partner.

-----, 1952.

12 [Duly sworn to by G. B. Zorbaugh; jurat omitted in printing.]

13 *Exhibit A to amended complaint*

DESCRIPTION OF THE "STOP THE MUSIC" PROGRAM

RADIO VERSION

This is a program of musical entertainment, featuring popular musical selections played by an orchestra and, usually, sung by a male or female singer. Valuable prizes are awarded for the correct identification of musical tunes by title, primarily by persons who are called on the telephone from the studio, and secondarily by members of the studio audience.

The show proceeds with the playing and singing of particular tunes, which are interrupted by order of the Master of Ceremonies to "Stop the Music," after a telephone connection has been established between the studio and the home of a pre-selected contestant. The contestant is then asked to give the title of the interrupted tune. (In case he did not hear the tune over his radio, or for some other reason desires to have the tune repeated, the Master of Ceremonies hums or sings it to him over the telephone.) If he answers correctly, he receives a merchandise prize; if not, he gets a consolation prize, and a member of the studio audience is then given an opportunity to identify the same tune. If he is successful he gets the prize that would have gone to a successful telephone participant. If not, then he too gets a consolation prize.

When a telephone participant correctly identified the interrupted tune he receives, in addition to the merchandise prize, an

14 opportunity to identify another tune, called the "Mystery Melody." If he identifies the Mystery Melody he wins the jackpot prize, comprising such items as bonds, automobiles, rings, clothing, etc., and usually valued in the aggregate at several thousand dollars. Should the telephone contestant fail to identify the Mystery Melody, the program moves forward with the playing and singing of another musical number, which again is interrupted by an order to "Stop the Music" after another participant, also preselected, has been called on the telephone.

The interrupted melodies are not carried over from question to question; a different tune is rendered each time. The Mystery Melody, however, is played for each initially successful telephone contestant, and carries over from telephone call to telephone call, and from one program to the next and successive programs, until some telephone participant correctly identifies it by title. Additions to the jackpot prize are made each week so long as the Mystery Melody remains unidentified.

The individuals who are to be given the opportunity to participate by telephone during a given broadcast are selected at random in advance by celebrities of the screen, stage or radio or by other disinterested persons whose services are enlisted for that purpose. The process of selection involves selection of (a) a telephone directory; (b) a page in that directory; (c) a column on the page; and (d) the numerical position in the column where the chosen participant's name will be found. ABC maintains a library of the nation's telephone directories, buying them from the local telephone companies throughout the country, and attempts to keep its collection up to date and as nearly complete as is possible.

15 The person who is doing the selecting makes the first drawings from a receptacle containing small discs which bear numbers corresponding to catalogue numbers assigned to the respective telephone directories. For each such directory, depending upon a formula that gives weight to population, there are one, two or more discs bearing its number. For instance, the number assigned to the directory for a small town may appear on one disc, whereas that assigned to one of the larger cities may appear on, say, thirty discs, the purpose being to assure the inhabitants of larger cities more nearly the same chance of being selected as persons living in smaller communities.

After a particular telephone directory has been identified in the first drawing, the name of the participant is then determined by drawings of numbers from successive receptacles, which serve to identify the page, column and line in the particular directory on which the participant's name will be found; provided that, if the name so selected is not that of an individual but is, for example,

that of a business concern, the individual subscriber next listed becomes the prospective contestant.

During the early part of each weekly broadcast, telephone calls for the pre-selected persons are placed through the regular long-distance operators, in each case from 10 to 20 minutes before the time when the selected person is expected to participate. Special switchboard facilities, manned by ABC employees, are maintained at the place where the program originates. When a call has been completed, the ABC employee who has made the call explains to the person called the purpose of the call, identifies or briefly describes the program and invites that person to participate as a contestant. If he agrees, he is asked to tune in the program on his radio and the telephone connection with him is maintained until the moment arrives for connecting him with the Master of Ceremonies. But the participant is not required to tune in the program on his radio, and if he does not do so, or if he should happen not to have a radio, the Master of Ceremonies at his request (as already stated) hums or sings the initial tune for him over the telephone, and he can listen to the Mystery Melody over his telephone.

"Stop the Music" is owned and produced by Louis G. Cowan, Inc. The prizes awarded on the program are procured by that concern from the manufacturer, if the prize is an article of merchandise, or from the concern which provides the service in case the prize is a service. Prizes are ordinarily furnished in return for a brief advertisement of the product or service that is involved.

TELEVISION VERSION

"Stop the Music (TV)" proceeds in the same manner as the "Stop the Music" radio program, except that visual clues, usually in the form of brief dramatizations by members of the cast, accompany the playing and singing of tunes other than the Mystery Melody.

The persons who are to be called over the telephone are selected in a manner similar to that employed for the radio program. Persons who view the program on television are invited to send in postcards which, on receipt, are grouped together in file boxes and identified by a TV station number, a file box number and the numerical position in the file box. Telephone participants are determined by random selection of a series of numbered discs, a process substantially the same as that followed for the radio program.

"Stop the Music (TV)" is also owned and produced by Louis G. Cowan, Inc., and the prizes awarded on the program are obtained in the same manner as above stated with reference to the radio program.

20

In United States District Court

CRAVATH, SWAINE & MOORE

15 BROAD STREET

New York 5

NEW YORK, October 14, 1952.

American Broadcasting Company v. U. S. A. and F. C. C.,
Civil Action 52-24.

National Broadcasting Company v. U. S. A. and F. C. C.,
Civil Action 52-37.

Columbia Broadcasting System v. U. S. A. and F. C. C., Civil
Action 52-38.

DEAR JUDGE LEIBELL: This letter is written on behalf of my firm as counsel for American Broadcasting Company, Messrs. Cahill, Gordon, Zachry & Reindel as counsel for National Broadcasting Company, Messrs. Rosenman, Goldmark, Colin & Kaye as counsel for Columbia Broadcasting System, Benedict P. Cottone, Esq., counsel for the Federal Communications Commission and the attorneys for the United States of America.

The above cases were marked for a pretrial conference to be held before your Honor on October 16, 1952, at 2:15 p. m. in Room 129 of the United States Court House.

For reasons appearing below, a pretrial conference was thought not to be necessary, and arrangements were made through Mr. Scheil for counsel in the three cases to meet with your Honor informally, at the time and place originally set for the pretrial conference, in order to discuss the matter of setting down the cases for argument.

21 We understand from Mr. Scheil that Your Honor wants to have a statement of the present position of the cases before meeting with counsel.

The actions were brought in August and September, 1949, to enjoin an order of the Federal Communications Commission which concerned the broadcasting of so-called "giveaway programs" over radio and television.

On September 19, 1949, Judge Rifkind entered an order in each action, convening a three-judge court to hear and determine the actions (such court to consist of himself, Your Honor and Judge Clark), and restraining the enforcement of the Commission's order pending a hearing by the three-judge court on plaintiffs' applications for preliminary injunctions. The latter applications were

made moot, however, by an order of the Commission itself, postponing the effective date of its own order until final determination of the above-entitled actions and another action in Chicago.

As counsel for the plaintiffs were of the view that the three cases could be presented to the court on a basis not involving factual issues, it was agreed with counsel for the Commission that the pleadings would be revised in such manner as to eliminate factual issues. Accordingly, after a considerable amount of discussion and exchanges of drafts of papers, amended complaints were filed and then, without the filing of any answers by the Commission, cross motions for summary judgment were made in each of the cases. The amended complaints and cross motions were filed September 22, 1952.

As we understand it, Judge Rifkind's resignation had the effect of dissolving the three-judge court constituted by his order, so that another three-judge court must be constituted.

It is the desire of all counsel to discuss with Your Honor on October 16 the matter of constituting a three-judge court and setting a date for hearing of the motions.

Sincerely yours,

Alfred McCormack.
ALFRED MCCORMACK.

Hon. VINCENT L. LEIBELL,
*United States District Judge,
United States Court House,
Foley Square, New York 7, N. Y.*

MM.

23 In United States District Court
Civil Action No. 52-24

[Title omitted.]

[File endorsement omitted.]

(*Affidavit*)

(Filed September 22, 1952)

STATE OF NEW YORK,
County of New York, ss:

G. B. Zorbaugh, being duly sworn, deposes and says:

1. I am Secretary and Acting General Attorney for American Broadcasting Company, Inc. (hereinafter referred to as "ABC"), plaintiff in this action.

2. This affidavit is made in support of ABC's motion for summary judgment herein.

3. ABC's amended complaint, verified by me on September 19, 1952, gives the pertinent facts concerning the nature of ABC's business and its interest in the subject matter of this action, as well as the nature of the irreparable injury that ABC would suffer if the Order of defendant Federal Communications Commission (hereinafter referred to as "the Commission") dated August 18, 1949, and the Rules thereto attached, were to become effective.

4. Exhibit A hereto annexed is a true copy of the complaint and unreported decree in the case of Clef, Inc. v. Peoria Broadcasting Co., Eq. No. 21368, C. C. Peoria County, Illinois, decree entered November 21, 1939. The Clef complaint contains a description of the radio program known as Mu\$ico. The Court ruled that Mu\$ico was not a lottery and did not violate any statutes or laws of the United States of America.

5. In 1939, the Solicitor of the Post Office Department issued two rulings with respect to whether Mu\$ico was a lottery. In the first ruling, dated July 1, 1939, the Solicitor advised the Postmaster at Monroe, Wisconsin, that Mu\$ico did not violate the Federal lottery laws. In the second ruling, dated September 29, 1939, the Solicitor advised the Postmaster of Wyoming, Illinois, that Mu\$ico did violate the Federal lottery laws.

The Solicitor of the Post Office Department has since stated in a letter dated May 3, 1949, addressed to the attorneys for Columbia Broadcasting System, Inc., that:

"* * * It is likely that if the 'Mu\$ico' plan were submitted to this office today, it would be held, in view of the change reflected in the enclosed notice, not to conflict with the postal lottery laws. * * *

The notice which the Solicitor enclosed in his said letter of May 3, 1949, was as follows:

"Ruling of the Solicitor of the Post Office Department to Postmasters, February, 1947:

"Rulings on Lotteries, Gift Enterprises, etc.—All postmasters should carefully note the following with regard to the present policy of the Office of the Solicitor in making rulings on lotteries, gift enterprises, etc., under Section 601, P. L. & R. 1940.

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or
25 time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present" (P. O. Bulletin February 13, 1947).

6. On the radio program "Truth and Consequences" a prize of \$10,000 was offered for the correct identification of a well-known person, referred to as "Mr. Heartbeat," described in the following riddle which was repeated in the course of each broadcast of the program:

"Sigh Sigh Pie
 "Half prince and pauper I
 "I'm drab they say
 "But remember fair play.
 "Ring Ring Hi."

Additional clues to the identity of this person were broadcast on the program each week until identification was made. Listeners were requested during the course of broadcasts to send in postcards bearing their names, addresses and telephone numbers. Listeners were also urged to contribute to the Heart Association, but such a contribution was not a condition of participation in the contest. Each week during the contest three postcards were selected at random and telephone calls were made in the course of the broadcast to the persons named on the cards. If the person called answered the telephone, he was asked to identify "Mr. Heartbeat." No clues were given to him at the time of this telephone call. A correct identification entitled him to the \$10,000 prize; a consolation prize consisting of a set of sterling silver was awarded in case of an incorrect answer.

The Solicitor of the Post Office Department on March 2, 1950, ruled that matter relating to the "Mr. Heartbeat" contest was

26 A true copy of the letter to the Solicitor requesting the ruling with respect to the "Mr. Heartbeat" contest and a true copy of the Solicitor's ruling with regard thereto are hereto annexed as Exhibits B-1 and B-2, respectively.

7. Exhibit C-1 hereto annexed is a true copy of a letter addressed by plaintiff (by G. B. Zorbaugh) to the Solicitor of the Post Office Department requesting a ruling as to whether certain material therein described, relating to the television program "Stop the Music," would be acceptable for mailing under Section 601 of the Postal Laws and Regulations of 1940; and Exhibit C-2 hereto annexed is a true copy of a letter, dated May 9, 1949, to plaintiff replying to the aforesaid letter and giving such ruling.

8. Exhibit D hereto annexed is a true copy of a letter with enclosures, dated December 30, 1943, from James Lawrence Fly, then Chairman of the Commission, to Senator Burton K. Wheeler, Chairman of the Senate Interstate Commerce Committee, proposing an amendment to Section 316 of the Federal Communications Act which would have changed the language of that Section in such a manner as to refer expressly to programs which offer prizes

to members of the radio audience selected in whole or in part by lot or chance. The suggested legislation was not adopted.

9. Exhibit E-1 hereto annexed is a true copy of a letter dated February 19, 1940, with enclosures, from Chairman Fly to the Attorney General, concerning certain radio programs alleged to be in violation of the Communications Act. Exhibit E-2 hereto annexed is a true copy of the Attorney General's reply to the Commission's reference.

27 10. Exhibit F-1 hereto annexed is a true copy of a letter dated March 29, 1940, with enclosures, from Chairman Fly to the Attorney General, concerning a radio program entitled "Dixie Treasure Chester." Exhibit F-2 hereto annexed is a true copy of the Attorney General's reply.

11. Exhibit G-1 hereto annexed is a true copy of a letter dated March 29, 1940, with enclosures, from Chairman Fly to the Attorney General, concerning a radio program entitled "Sear's Grab Bag." Exhibit G-2 hereto annexed is a true copy of the Attorney General's reply.

12. Exhibit H-1 hereto annexed is a true copy of a letter dated March 29, 1940, with enclosures, from Chairman Fly to the Attorney General, concerning a radio program entitled "Especially For You." Exhibit H-2 hereto annexed is a true copy of the Attorney General's reply.

13. Exhibit I-1 hereto annexed is a true copy of a letter dated March 29, 1940, from Chairman Fly to the Attorney General, concerning the radio program "Mušico." Exhibit I-2 hereto annexed is a true copy of the Attorney General's reply. Exhibit I-3 hereto annexed is a true reproduction of continuity copy for the Mušico program broadcast over radio station WGN, Chicago, on February 16, 1940.

14. Exhibit J-1 hereto annexed is a true copy of a letter dated March 29, 1940, from Chairman Fly to the Attorney General concerning a radio program entitled "Songo." On information and belief, Songo was very similar to Mušico; cards were distributed within the service area of the station so that listeners might check the songs broadcast. Exhibit J-2 hereto annexed is a true copy of the Attorney General's reply.

28 15. Exhibit K hereto annexed is a written transcription of a typical broadcast of "Stop the Music" (Radio) and of "Stop the Music" (television) which were presented on June 22, 1952, and April 17, 1952, respectively.

G. B. ZORBAUGH.

Sworn to before me this 19th day of September 1952.

[SEAL]

LORANE M. SCHIFF,
Notary Public.

Lorane M. Schiff, Notary Public, State of New York, No. 24-8807375.

Qualified in Kings County. Certified in the following offices: County Clerk: New York County; Register: New York, Kings, Queens, Bronx Counties.

Commission expires March 30, 1954.

29

Exhibit A to affidavit

In the Circuit Court of Peoria County

Equity no. 21368

CLEF, INC., A CORPORATION, PLAINTIFF

v.

PEORIA BROADCASTING COMPANY, A CORPORATION, DEFENDANT

STATE OF ILLINOIS,

County of Peoria, ss:

COMPLAINT

Clef, Inc., a Corporation, Plaintiff, by Quinn, Quinn & O'Hern, its attorneys, complaining of Peoria Broadcasting Company, a Corporation, Defendant says that:

1. Plaintiff, Clef, Inc., is an Illinois corporation with its principal place of business in Chicago, Illinois.

2. Defendant, Peoria Broadcasting Company, is an Illinois corporation with its principal place of business in the City of Peoria, County of Peoria and State of Illinois.

3. Plaintiff owns and controls a certain game or advertising arrangement which is familiarly known as Mu\$ico (which is hereinafter more particularly described) as to which Plaintiff, as assignee, has applied for a patent, as well as for registration of the trade-mark "Mu\$ico," and as to which it owns all interest in a certain copyright originally taken in the name of John H. Farwell, 1938, relating thereto. Plaintiff further avers that no other person, firm or corporation has any rights in or to said game other than such as result from authorized use with the consent of Plaintiff.

4. Defendant, Peoria Broadcasting Company, owns, operates and maintains in and near the City of Peoria, Illinois, a certain radio station and transmission facilities familiarly known
30 by the call letters of Station WMBD. Plaintiff further avers that as part of the service furnished by Defendant, it offers the use of its radio station facilities to the general public for advertising purposes.

5. On September 11, 1939, the Plaintiff, acting by and through its agent, H. W. Kastor & Sons Advertising Company, a Corporation entered into a written agreement with Defendant, acting by and through its duly authorized agent, Free & Peters, Inc., a Corporation for the use of the facilities of the Defendant in the presentation of a thirty-minute weekly program employing the game of Mušico to advertise the products of Kroger Grocery & Baking Company, a Corporation, pursuant to an express agreement on the part of Plaintiff to furnish such service to said Kroger Grocery & Baking Company, a Corporation. Plaintiff further avers that as much of the said contract between Plaintiff and Defendant as is relevant to the determination of this case is as follows:

<i>Length of broadcast</i>	<i>Hour</i>	<i>Days</i>	<i>Times per week</i>	<i>Total number times</i>
30-minute program	8:30 p. m. to 9:00 p. m.	Fridays	1	13

Commencement date September 22, 1939.

Expiration date December 15, 1939.

Program Material Arrangements.

Mušico program.

Continuity and complete instructions will be sent by program department.

Plaintiff further avers that by and through its agent hereinabove referred to, it furnished material for the production of said program during all of the weekly Friday periods specified therein and is ready, willing and able to furnish all such programs, continuity and complete instructions for the Friday programs under the terms of the said contract which have not yet
31 been presented commencing with November 24, 1939, and terminating on December 15, 1939. Plaintiff likewise avers that it has paid or has caused to be paid all sums or charges for said radio broadcasts which were required to be paid by the terms of said contract, and is ready, willing and able by and through its agent hereinabove referred to to continue to do all things required by it to be done under the terms of said contract, and to make or cause to be made all payments required to be made by it under the terms of said contract for the purpose of procuring the broadcast facilities at the periods stated in such contract on the Fridays which fall on November 24, 1939, upon December 1, 1939, upon December 8, 1939, and upon December 15, 1939. Plaintiff further avers that by and through its agent herein referred to it has tendered to Defendant all payments required to be made by it under the terms of said contract for the unexpired portion thereof, and has offered to fully perform all things required by it to be done pursuant thereto.

6. The program which Plaintiff has presented and which has heretofore been broadcast during the periods specified in the contract between Plaintiff and Defendant and which is herein for ready reference referred to as the "Mu\$ico" program, and relevant matters incident thereto, is described as follows:

a. Cards known as "Mu\$ico" cards in the form of the card hereto attached and expressly made a part hereof and marked "Exhibit A" are printed and produced by the Plaintiff each week and are distributed in all Kroger Stores in the vicinity of the City of Peoria, Illinois, and in the WMBD broadcast area, and

are likewise distributed generally in such communities, and, upon request directed to radio Station WMBD and to any Kroger store in the broadcast area. Persons desiring cards are not required to purchase anything, and in fact are not required to come to the Kroger store or any other point of distribution, but may obtain cards at such distribution points. Cards are likewise distributed house to house in the broadcast area.

b. As is shown by Exhibit A hereto attached, each of said cards contains five rows with five songs printed in each of the rows, making in all a total of twenty-five songs aligned in the five parallel rows on each card. During the course of the program approximately eighteen songs are played, and radio listeners thereupon attempt to identify the songs, (of which only the melody is played), by the title of the song, and, if any such listener has a card, such listener then checks the song title on the card in his possession if such song title appears on such card. It is not necessary, however that a listener to the program have a card in order to participate. He may, if he possesses the requisite skill make a written notation of each of the titles of the songs which are played, and transmit such written notation, together with a slogan of the character hereinafter referred to, and will thus be entitled to participate equally with the holder or holders of any card which shall be transmitted to the radio station with the slogan as hereinafter stated.

c. All cards distributed are potential winners, and the skill of each participant in the game both in recognizing the songs when and as played and in writing the slogan as specified in Rule 7 on Plaintiff's Exhibit "A" hereto attached is the only basis for the making of the awards referred to.

d. If a participant correctly recognizes song titles and checks off songs which are played during the broadcast to complete rows 2, 4 or 5 on the card held by the participant (of the character shown in Exhibit A), any such participant is entitled to receive, free of charge, a large shopping bag filled with groceries upon presentation of such winning card to any Kroger store

in the broadcast area. If a participant correctly checks song titles in any single row, or if such participant has no card and correctly notes in writing the song titles as played during the broadcast, any such participant may (upon writing his slogan in ten words or less, completing the sentence "I like Kroger Hot-Dated Coffee because -----"), participate in the awarding of four cash prizes weekly, the first prize being \$20.00, the second \$15.00, the third \$10.00 and the fourth \$5.00 in cash. The only basis of the selection of winners of such prizes is the skill of the participant in accurately recognizing the song titles from listening to the melodies as played, and in devising the slogan referred to. Each card presented is a potential winner, and there are no blanks. Any listener whether possessed of a card or not, if able to recognize the song titles, may participate in the awards.

7. Defendant refuses to perform its contract to furnish the radio facilities referred to in this complaint for the broadcasting of the program herein referred to on November 24, 1939, on December 1, 1939, on December 8, 1939, and on December 15, 1939, unless compelled to do so by order of Court. Defendant assigns no other reason for its refusal to perform said contract other than the nature of the program described in this Complaint which it contends violates Federal laws relating to broadcasts and
 34 certain Federal postal laws. Plaintiff avers that there is no legal or equitable reason or justification for the arbitrary refusal of Defendant to furnish the radio facilities contracted for and to perform its agreement with Plaintiff.

8. Plaintiff further avers that it has made preliminary arrangements to merchandise its Mu\$ico program in other areas in the United States of America, and that if it is not permitted to fulfill its undertaking to broadcast its Mu\$ico program on WMBD upon the said November 24, 1939, December 1, 1939, and December 8, 1939, and December 15, 1939, as provided for in its contract, it will suffer irreparable injury in its inability to sell or produce its said program in other areas in the United States.

9. Plaintiff further avers that the service and broadcasting facilities of Defendant through its radio station WMBD is unique and cannot be obtained elsewhere; that said station is the only radio station in the City of Peoria, Illinois; that great numbers of people have become familiar with the Mu\$ico program as presented on said radio station; that it has been announced that said program will continue until December 15, 1939; and that the cessation of said program through arbitrary action of Defendant as herein stated for the succeeding four Fridays will cause irreparable injury to Plaintiff, and may result in the destruction of the merchantable value or saleability of the Mu\$ico program

which is Plaintiff's only valuable asset, and that the amount of damage which would be incurred by Plaintiff as a result thereof would be impossible to ascertain.

10. Plaintiff is without adequate remedy in the premises except in a Court of equity.

35 Wherefore Plaintiff demands judgment:

I

That Defendant be required to specifically perform its contract with Plaintiff and to furnish radio broadcasting facilities to Plaintiff, acting through its authorized agent, for the thirty-minute period commencing at 8:30 p. m. and continuing until 9:00 p. m. on Friday, November 24, 1939, on Friday, December 1, 1939, on Friday, December 8, 1939, and on Friday, December 15, 1939, for the presentation of its Mu\$ico program advertising Kroger products as set forth in this Complaint and as heretofore performed and presented over the radio station WMBD operated by Defendant in the City of Peoria, Illinois.

That Plaintiff may have such other and further relief as may be just and equitable in the premises.

CLEF, INC.,

By QUINN, QUINN & O'HERN,
Its Attorneys.

QUINN, QUINN & O'HERN,
Attorneys-at-Law,
1104 Lehmann Building,
Peoria, Ill.

*Exhibit A to Musico Complaint**Fill across a row. You may win a prize in***M U S I C O**TRADE
MARK

Copyright 1935, John H. Barwell Claf, Inc., Patent Applied For.

MOON GLOW	EL RANCHO GRANDE	DIRAH	DARLING MELLIE OREY	NEVER IN A MILLION YEARS
ROW ONE	FILL A ROW ACROSS			
SWEET SUE	ON A BICYCLE BUILT FOR TWO	CARIACA	JUST AROUND THE CORNER	COMIN' ROUND THE MOUNTAIN
ROW TWO	FILL A ROW ACROSS			
Carry Me Back to Ol' Virginia	SWEET LEILANI	GO FLY A KITE	POOR BUTTERFLY	TURKEY IN THE STRAW
ROW THREE	FILL A ROW ACROSS			
TEA FOR TWO	MY LAST GOODBYE	ILLINOIS LOYALTY	A MAN AND HIS DREAMS	BETTY CO-ED
ROW FOUR	FILL A ROW ACROSS			
NAIL TO THE ORANGE	MOON INDIO	WHAT'S NEW	GOODNIGHT SWEETHEART	FALLEN LEAF
ROW FIVE	FILL A ROW ACROSS			

This is your MUSICO score card

F 1056

\$50 in cash prizes, also bags of groceries.

Listen in every Friday night from 8:30 to 9:00, Station WMBD (1440 on your dial) Peoria, Illinois. This fascinating game is sponsored by your Kroger Stores. This card is good only for the broadcast of November 24th. Get new card next week. No purchase is required in order to obtain a MUSICO card. SEE OTHER SIDE FOR RULES OF THIS FASCINATING GAME

Rules—How to win -MUSICO PRIZES

1. Listen every Friday night at 8:30 to 9:00 P.M. to Station WMBD (1440 on your dial) Peoria, Illinois.
2. As each song is played identify it and check title on this score card.
3. Listen carefully to the radio program and follow instructions as given by the announcer.
4. MUSICO score cards are distributed by your local Kroger Store or may be obtained at Station WMBD. New score cards for next week's program will be distributed starting each Saturday.
5. This is a game of skill. Every card is a potential winner. There are no blanks. No purchase or obligation of any kind is required to obtain a card.
6. Employees of Kroger Grocery & Baking Co. or their families are not eligible for prizes.
7. If you fill in any row across correctly you may win grand prize of \$25.00 by simply writing "most unique and apt" slogan—I like Kroger Hot-Sated Coffee because



**I NEVER MISS
MY MORNING
KISS—since really
fresh coffee cured
our morning quarrels**



**DRINK KROGER'S HOT DATED
FRENCH BRAND or
SPOTLIGHT COFFEE**
SAVE UP TO 10¢ A POUND

(In words or less)

Prize winners give Kroger Grocery & Baking Co. permission to use name, address, testimonial and/or slogan submitted for advertising or publicity purposes.

Name _____

Address _____

Cards must be mailed to WMBD MUSICO Peoria, Ill. on next day—Saturday following broadcast. Duplicate prizes awarded in case of ties. Decision of judges is final.

37

Exhibit A to affidavit

In the Circuit Court of Peoria County

Equity No. 21638

CLEF, INC., A CORPORATION, PLAINTIFF

v.

PEORIA BROADCASTING COMPANY, A CORPORATION, DEFENDANT

STATE OF ILLINOIS,

County of Peoria, ss:

DECREE

This matter having come on to be heard upon the Complaint of Clef, Inc., a Corporation, Plaintiff, and the Answer of Peoria Broadcasting Company, a Corporation, Defendant, and the Motion to Strike said Answer on behalf of the Plaintiff, and the Court having heard the arguments of counsel and being fully advised in the premises, having heretofore stricken the Answer of said Defendant for legal insufficiency, and having found that the program specifically described in the Complaint, known as the "Musico" program, does not violate any Federal Statutes or those Federal Statutes specifically cited as 47 U. S. Code 316,

18 U. S. Code 336 and 18 U. S. Code 387, and the Defendant, by its counsel, in open court having elected to stand by its Answer, and having admitted and confessed in such Answer that all of the allegations of the Complaint are true and correct, and having again admitted in open court that all of said allegations of the Complaint are true and correct, and the Court upon consideration thereof, having heard the arguments of counsel for the respective parties, finds that it has jurisdiction of the subject matter and of

the parties hereto, and that the matters and things set forth in said Complaint are true and correct. The Court further

finds that no consideration of any kind is required, or derived, directly or indirectly from any participant in such Mu\$ico game and radio program described in the Complaint, and that such game, as described in said Complaint, constitutes a game of skill and not a game of chance. The Court further finds that the Mu\$ico game and the radio program described in the Complaint do not violate any statutes or laws of the United States of America, and that the contract relating thereto between Plaintiff and defendant should be specifically enforced.

It is therefore ordered, adjudged and decreed by the Court that the Defendant, Peoria Broadcasting Company, a Corporation, be and it is hereby required and directed to specifically perform its contract with Plaintiff, Clef, Inc., a Corporation, acting through its authorized agent or agents, and to furnish radio broadcasting facilities to said Plaintiff, acting through its authorized agent or agents, for the thirty minute periods commencing at 8:30 p. m. and continuing until 9:00 p. m. on Friday, November 24, 1939, on Friday, December 1, 1939, on Friday, December 8, 1939, and on Friday, December 15, 1939, for the presentation of Plaintiff's Mu\$ico program advertising the products of Kroger Grocery & Baking Company, a Corporation, in the manner as provided by contract between said parties, and as specifically set forth in the Complaint in this cause.

Enter:

JOSEPH E. DAILY,
Circuit Judge.

O. K. as to form:

CHARLES V. O'HERN,
JAY J. ALLOY,
Counsel for Plaintiff.
H. D. MORGAN,
Counsel for Defendant.

COMPTON ADVERTISING, INC.,
February 24, 1950.

Mr. SAUL MINDEL,
*Office of the Solicitor,
Post Office Department, Washington, D. C.*

DEAR MR. MINDEL: Attached is the outline for the "Mr. Heartbeat" contest on the "Truth or Consequences" program sponsored by Duz, which is manufactured by Procter and Gamble.

We discussed this over the telephone on Friday, February 24, and you requested this outline which covers the details you requested. You will please note that special announcements are made during the program for listeners to send their contributions directly to the Heart Association either Nationally or locally, tying in directly with the National Drive for funds toward the Heart Association.

We would appreciate your approval so that we can start this by Saturday, March 4.

Cordially,

(S) DONALD J. FINLAYSON.

DJF: mb.

FEBRUARY 24, 1950.

"TRUTH OR CONSEQUENCES"

"MR. HEARTBEAT" CONTEST

Herewith are the details of the "Mr. Heartbeat" Contest to be featured on "Truth or Consequences" in honor of the Heart Association's fund raising campaign:

1. Listeners will be asked by Ralph Edwards to send a postal card with their name, address, and phone number to "Truth or Consequences."

2. Each Saturday, at the time of broadcast, three cards will be selected by a prominent motion picture star. The sender of the card selected will then be phoned and asked the identity of "Mr. Heartbeat." Clues as to the mystery man's identity will be furnished periodically as the contest progresses.

3. The individual furnishing the correct identity will win cash and merchandise prizes.

4. In addition to furthering the Heart Association's campaign, special announcements will be made weekly asking the listeners to contribute generously to the Heart Association's fund. Listeners will be asked to send their contributions directly to the Heart Association, and to give generously wherever they see the big red plastic heart displayed.

5. To prevent misdirection of contributions an announcement such as, "Be sure to send your contributions directly to the Heart Association and not to "Truth or Consequences" will be made weekly wherever funds are solicited.

41 *Exhibit B-2 to affidavit*

Address Reply to "The Solicitor" and refer to initials and number SJM: cl.

POST OFFICE DEPARTMENT,
OFFICE OF THE SOLICITOR,
Washington 25, D. C., March 2, 1950.

MR. DONALD J. FINLAYSON,
*Compton Advertising, Inc., Rockefeller Center,
630 Fifth Avenue, New York 20, New York.*

DEAR MR. FINLAYSON: This will acknowledge your letter of February 24, 1950, transmitting an outline of a "Mr. Heartbeat" prize plan to be conducted on the "Truth or Consequences" program for the American Heart Association.

According to the outline, those desiring to participate will be invited to send to Ralph Edwards postal cards bearing their respective names, addresses, and telephone numbers, and each Saturday during the broadcast three cards will be selected for a telephone call, the person called then to have an opportunity to attempt to identify "Mr. Heartbeat," prizes to be given to the one who does so correctly.

Listeners will be encouraged to contribute to the Heart Association campaign:

"* * * Listeners will be asked to send their contributions directly to the Heart Association, and to give generously wherever they see the big red plastic heart displayed.

"To prevent misdirection of contributions an announcement such as, 'Be sure to send your contributions directly to the Heart Association and not to "Truth or Consequences,"' will be made weekly wherever funds are solicited."

During your discussion with this office when you telephoned yesterday, you stated that listeners will be clearly instructed, in addition to other statements made to them, "Do not send contributions to 'Truth or Consequences,'" and that it will be made clear to them that their chances of being selected for a call are in no way affected by their making, or failure to make, a contribution.

Upon the above conditions, matter relating to the plan will be accepted for mailing insofar as Section 36.6, Postal Laws and Regulations of 1948, is concerned.

Very truly yours,

(S) Frank J. Delany,
FRANK J. DELANY,
Solicitor.

APRIL 28, 1949.

MR. FRANK J. DELANY,
Office of the Solicitor,
Post Office Department, Washington 25, D. C.

DEAR MR. DELANY: We will appreciate having an advisory opinion from you as to whether material relating to a television program hereinafter described would be acceptable for mailing under Section 601 of the Postal Laws and Regulations of 1940.

We have been broadcasting a radio program entitled "Stop the Music" which provides for listener participation by telephone. Prior to each broadcast certain names are selected at random from our collection of telephone books. During the program the persons chosen are telephoned and asked to identify a musical selection which is being played by the orchestra. If the participant identifies the selection correctly he receives an award of an article of merchandise, and an opportunity to identify another musical selection which is known as the "mystery melody." If he identifies the "mystery melody" he receives additional articles of merchandise.

The "Stop the Music" program has now been adapted for television and will be broadcast over our television facilities under the sponsorship of P. Lorillard Co. and the Admiral Corporation, commencing May 5, 1949. Because the television program will be available only to persons in the area serviced by our television facilities, connected by coaxial cable, we cannot select the names of participants at random from telephone books. We have, therefore, secured lists of television set owners, in the areas where the program will be available, compiled by Hooper, Inc. and another furnished by Television Guide but, as you know, such lists are not necessarily complete. Consequently, we propose to announce in advertisements and by other means that persons who wish to participate in the "Stop the Music" program may mail a card giving their names and telephone numbers, which cards will be used to complete the lists from which names of persons to be telephoned will be selected at random.

When it became evident to us several days ago that it would be necessary to supplement our lists in this manner, I telephoned Mr. Mindel of your Department, with whom we have discussed similar problems in the past, to discuss the problem with him. On the basis of our conversation Mr. Mindel agreed with our opinion that the scheme in question is not a lottery, and, therefore, material concerning the plan would be acceptable for mailing. He did, however, ask that we present the problem to you in writing in order to secure a written confirmation of that opinion.

We shall appreciate your early consideration of this matter.

Very truly yours,

G. B. ZORBAUGH.

43

Exhibit C-2 to Affidavit

POST OFFICE DEPARTMENT,
OFFICE OF THE SOLICITOR,
Washington 25, D. C., May 9, 1949.

Mr. G. B. ZORBAUGH,
*American Broadcasting Co., Inc.,
7 West 66th Street, New York 23, New York.*

DEAR MR. ZORBAUGH: This will acknowledge your letter of April 28, 1949 (received in this office May 5), relative to the conduct of "Stop the Music" as a television show.

According to your letter, it is proposed to announce in advertisements and by other means that persons who wish to become eligible for a call during the program "may mail a card giving their names and telephone numbers, which cards will be used to complete the lists from which names of persons to be telephoned will be selected at random."

Submission of the postal cards would not be regarded as rendering matter relating to the scheme nonmailable under the postal lottery statute.

However, the program is one concerned primarily with use of television and radio facilities, and whether or not its operation in the manner proposed would be regarded by the Federal Communications Commission as conflicting with 18 U. S. C. 1304 is a matter for determination by that agency.

Very truly yours,

Frank J. Delany,
FRANK J. DELANY,
Solicitor.

44

Exhibit D to affidavit

[From hearings before the Committee on Interstate Commerce on S. 814, 78th Cong., 1st Sess. (1944)]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., December 30, 1943.

HON. BURTON K. WHEELER,
*Chairman, Interstate Commerce Committee,
United States Senate, Washington, D. C.*

MY DEAR CHAIRMAN WHEELER: I note in reexamining the testimony before your committee on S. 814 that there was a good deal of discussion of the so-called money give-away programs to which I did not allude in my testimony.

The problem of money give-away programs is a very troublesome one in broadcasting. This type of radio program depends for its popularity on the holding out to the listener of a chance that he might be awarded money or other prize rather than on

the excellence of the program itself. This type of program has been continually increasing to the serious deterioration of program service. The attached article from the Washington Post of December 26, 1943, will give you a slight idea of the type of problem involved.

Under the present section 316 of the Communications Act, the Commission has been unable to deal adequately with the problem. I believe that the matter is serious and important enough to warrant action by Congress at this time. I am therefore enclosing a proposed draft of a new section 316 which I believe will prevent most of the programs that I have indicated. Under this proposed statute, programs of the type of Information Please or the Qu. Kids, Dr. I. Q., Take It or Leave It, etc., where prizes are awarded will not be affected. It will still be permissible to offer prizes to members of the listening public who make a substantial contribution to the program by furnishing questions to be asked of participants and it will still be lawful to offer prizes to participants in the program where the prizes depend upon the ability of the participants to answer questions put to them. This type of program, in my opinion, is unobjectionable since the public must be attracted by the quality of the radio program itself and not by the possibility of receiving a prize. The proposed statute is directed at the type of programs like Captain Cash, etc., mentioned in the attached article, where members of the radio audience not in the studio are selected by lot or chance to win a prize if they can show that they were listening to the particular program. Under this type of program, listeners are attracted not by the quality of the program but simply by the hope of being awarded a valuable prize simply by listening to a particular program. That is not good broadcasting.

Sincerely yours,

JAMES LAWRENCE FLY,
Chairman.

45 [From the Washington Post, December 26, 1943]

BANK NIGHT IS GONE, BUT MONEY GIVE-AWAY BY RADIO STILL FLOURISHES

(By Marjorie Kelly)

If one fine morning you call up your wife, and she answers not with "Hello" but with "Goodygloop Hand Lotion works wonders on rough hands, red hands," take heart. Maybe she isn't crazy. She might just be listening to WWDC.

Password Please has one of the more insidious formulas among money-give-away programs. The "password" is the program's commercial; the announcer calls a telephone number without an-

nouncing the number over the air. If the person called answers with the password, he gets the jackpot. So that all over the city hundreds of people whose telephones happen to ring at that moment startle unsuspecting solicitors, bill collectors, and bosom friends by spiling a commercial at them. Neat, isn't it?

STATION AND SPONSOR BOTH PROFIT

Why the money give-away racket should continue to flourish on minor-league radio stations when its counterpart in modern culture, bank night at the movies, has passed into the limbo of institutions the fickle American public has tired of is a question. But flourish it does; though theaters no longer vie for patrons with combinations of Dorothy Lamour and a \$90 jack pot, radio stations still find it profitable to bribe listeners to listen. And it is profitable—both to station and sponsor. The station gets its sizable share of the take; and sponsors find their sales boosted most satisfactorily by spots on these shows.

There are five on local stations—Captain Cash, Mr. Moneybags, Pin Money, Password Please, and Walter Compton's Magic Dollars.

Each has its own formula for selecting the winners, but they have in common the habit of asking the listener a question, or making him repeat a password. This serves a double purpose. The question or password may involve the sponsor's name, thus increasing the value of spot announcements on these programs. Also, with the introduction of a question which must be answered the program cannot be called a lottery. The questions may be so easy that a 3-year-old couldn't muff them—"What flavor is lemon pie?" or "What do you want for Christmas?"—but so long as they are asked the program is not a lottery.

With approximately 179,000 home telephones in the District, the odds are roughly 179,000 against you winning on any one program.

46 You get better odds in the numbers game—1,000 to 1.

Not that we recommend that either, we hasten to add.

But despite the odds, people do listen faithfully, week in and week out, in hopes of a rake-off that would pay the mortgage.

One woman called Jay Caldwell at WOL to tell him that she had listened every morning for months, and he had never called her. So, recalling the number of calls she had had while she was in the bathtub, she took to soaking every morning during Caldwell's period on the air. But even then the laws of chance didn't favor her.

COMES TO HER SENSES IN TIME

Norman Reed, who is Captain Cash and master of ceremonies on "Password Please" as well, tells of one woman who wrote that

when she heard her number announced she was so excited she started running around the room and couldn't remember where the telephone was. Just before the final ring (seven rings are allowed on this program) she came to her senses sufficiently to pick up the phone.

Norman Brokenshire tells a story on a gang of enterprising people who thought up the idea of listening every morning and calling up the persons whose names were announced over the air. (On "Pin Money" the name is announced and then recordings are played during a 10-minute interval while Brokenshire waits for the chosen individual to telephone him.) These ingenious ones would locate the person whose name was announced and say to him: "I know how you can get \$20. If you'll give me \$5."

Brokenshire fixed the booblers by announcing over the air that if that happened to a listener, he should take the tip but not reward the tipster.

Norman Reed's long experience with money give-aways has borne fruit in a wishful little rhyme which reads:

"Of all sad words of tongue or pen

The saddest are these: 'I wasn't listening just then.'"

47

PROPOSED DRAFT FOR A NEW SECTION

LOTTERIES AND OTHER SIMILAR SCHEMES

SEC. 316. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, (a) any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes [sic], or (b) any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than \$1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.

48

Exhibit E-1 to affidavit

FEBRUARY 19, 1940.

The Honorable, the ATTORNEY GENERAL,
Washington, D. C.:

MY DEAR MR. ATTORNEY GENERAL:

Pursuant to recent discussion with you I have caused to be assembled and transmit herewith information concerning the

broadcasting of certain programs alleged to be in violation of Section 316 of the Communications Act of 1934, which provides a penalty for the broadcast of information concerning a lottery, gift enterprise or similar scheme dependent in whole or in part upon lot or chance.

The following documents are attached hereto:

In re: The Wichita Falls Broadcasting Company, Radio Station KWFT, Wichita Falls, Texas, continuity of programs broadcast by said station for Mead's Bakery;

In re: Big Spring Herald Broadcasting Company, Radio Station KBST, Big Spring, Texas, photostatic copy of a letter from Joe A. Faucett, County Attorney, Big Spring, Texas, which shows the continuity of a program broadcast by said station for Mead's Bakery; and

In re: National Broadcasting Company, Radio Station WEAf, New York, N. Y., continuity of a program broadcast by said station, and associated stations, known as the "Red Network" of the National Broadcasting Company, for the distributors of a proprietary remedy known as "Tums", said program being generally known as the "Pot of Gold".

These programs are being currently broadcast by the above designated stations with the exception of Station KWFT. The licensee of that station has advised the Commission that it has discontinued broadcasting the program for Mead's Bakery.

These matters are transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in these matters which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY,
Chairman.

Enclosures.

49 THE STATE OF TEXAS,
County of Wichita:

Before me, the undersigned authority, on this day personally appeared Joe B. Carrigan, known to me to be a resident, credible citizen of Wichita Falls, Texas, and the President of Wichita Broadcasting Company, a corporation, who, after being by me first duly sworn, did upon oath say:

1. That on the 20th day of November 1939, Mead's Bakery entered into a contract in writing with Radio Station KWFT for partial sponsorship of the program "Keep Fit to Music" to be broadcast by Wichita Broadcasting Company over its Station KWFT in Wichita Falls, Texas, at 10:30 a. m., five times each

week, Monday through Friday on the basis of the terms set out in the contract.

2. That there is attached hereto and made a part hereof for all purposes, all contracts and agreements entered into in connection with the said broadcasts.

3. There is attached hereto and made a part hereof for all purposes an exact copy of all announcements made on said broadcast. There is one announcement made in connection with the program each day and two announcements are alternated, only one being used on any one broadcast; that the announcements do contain all of the steps involved in the purchase of a loaf of Mead's Bread from a housewife for a consideration of \$5.00, except the fact that the principal purpose of the visit of the representative of Mead's Bakery to a home in Wichita Falls is to demonstrate products of Mead's Bakery.

4. There is furnished herein, by attaching hereto, a list of the names and addresses from all persons from whom a representative of Mead's Bakery has purchased a loaf of Mead's Bread for \$5.00.

JOE B. CARRIGAN.

Sworn to and subscribed before me, the undersigned Notary, by Joe B. Carrigan, this 1st day of January 1940.

LUCILE B. FRALEY.

50

[COPY]

ADVERTISING ORDER

RADIO STATION KWFT, WICHITA FALLS, TEXAS

Order No.-----

Date Nov. 18, 1939.

You are hereby authorized to furnish to the undersigned the following Broadcasting Service from Radio Station KWFT 1 15-minute program daily Monday thru Friday 10:30-45 a. m. "Keep Fit To Music"; 1 50-word announcement daily Mon. thru Fri.; 4 50-word anns. Sat.

Rate \$25.00 per wk. for 15-min. program; 45.00 per mo. for announcements.

Commencing November 20th, 1939, and ending indefinite.

The total cost of aforesaid advertising to the undersigned shall be \$----- payable at the office of Radio Station KWFT in Wichita Falls, as follows: regular.

This order shall not be in force until signed by Manager of Radio Station KWFT on or before the 10th of the month follow-

ing month in which all or a portion of the services have been rendered.

RADIO STATION KWFT,
By (Signed) CHAS. E. CLOUGH,
Salesman Commercial Manager.
By _____
Manager.

Firm:

MEAD'S BAKERY,
By (Signed) W. L. MEAD.
(See other side for conditions of acceptance.)

CONDITIONS OF ACCEPTANCE OF ALL ORDERS

1. Station reserves the right to reject any program or announcements and/or the personnel of any program without any liability therefor.

2. This agreement may be terminated by either party by giving the other two weeks' written notice, unless otherwise stipulated on the face of this order. If the client terminates the agreement, he will pay the station according to the station's published rates for the lesser number of periods, for all services previously rendered by the station.

3. All service rendered by the station is subject to the terms of any licenses held by the station and also to all Federal, State and Municipal laws and regulations now or hereafter in force.

4. Client agrees to furnish copy at least 24 hours before time of broadcast, and if client fails to do so, station is authorized to prepare such copy to be broadcast, and in such event, the client shall make payment for such time at the rate specified.

5. The standard card rates of KWFT to be payable for all broadcasts until a quantity discount as provided in card rates shall have been earned, at which time the designated credit shall be allowed on bills for subsequent broadcasts. KWFT reserves the right to substitute a sustaining non-commercial program or a network program of any kind, in lieu of any local commercial program, and also reserves the right to reschedule local commercial program so deleted to any other period in same day, if possible, and if not possible to reschedule program contracted for herein, or completely delete same and make no charge therefor.

All the Conditions of This Contract are Contained Herein and no Verbal Agreement Shall Alter These Conditions in Any Way

ADVERTISING ORDER

RADIO STATION KWFT, WICHITA FALLS, TEXAS

Order No. -----

Date July 10, 1939.

You are hereby authorized to furnish to the undersigned the following Broadcasting Service from Radio Station KWFT 3 50-word announcements—Each week day excepting Sunday.

Time—Various.

Rate \$25.00 per week.

Commencing July 15, 1939, and ending July 14, 1940.

The total cost of aforesaid advertising to the undersigned shall be \$1,300.00 payable at the office of Radio Station KWFT in Wichita Falls, as follows: Regular.

This order shall not be in force until signed by Manager of Radio Station KWFT on or before the 10th of the month following month in which all or a portion of the services have been rendered.

RADIO STATION KWFT,
By (Signed) CHAS. E. CLOUGH,
Salesman Commercial Manager.
By ———, *Manager.*

Firm:

MEAD'S BAKERY,
By (Signed) W. L. MEAD.

(See other side for conditions of acceptance.)

CONDITIONS OF ACCEPTANCE OF ALL ORDERS

1. Station reserves the right to reject any program or announcements and/or the personnel of any program without any liability therefor.

2. This agreement may be terminated by either party by giving the other two weeks' written notice, unless otherwise stipulated on the face of this order. If the client terminates the agreement, he will pay the station according to the station's published rates for the lesser number of periods, for all services previously rendered by the station.

3. All service rendered by the station is subject to the terms of any licenses held by the station and also to all Federal, State and Municipal laws and regulations now or hereafter in force.

4. Client agrees to furnish copy at least 24 hours before time of broadcast, and if client fails to do so, station is authorized to prepare such copy to be broadcast, and in such event, the client shall make payment for such time at the rate specified.

5. The standard card rates of KWFT to be payable for all broadcasts until a quantity discount as provided in card rates shall have been earned, at which time the designated credit shall be allowed on bills for subsequent broadcasts. KWFT reserves the right to substitute a sustaining non-commercial program or a network program of any kind, in lieu of any local commercial program, and also reserves the right to reschedule local commercial program so deleted to any other period in same day, if possible, and if not possible to reschedule program contracted for herein, or completely delete same and make no charge therefor.

All the conditions of This Contract Are Contained Herein and no Verbal Agreement Shall Alter These Conditions in any way

52

KWFT

CONTINUITY

Advertiser: Mead's Bakery.

Date-----

Time----- Type-----

The Mead's Fine Bread Mystery Woman is still causing considerable comment through her continued activities. Has she visited you as yet? You ladies had better be prepared for her, because she may stop at your door at any time—and when she does, she will offer to buy a loaf or part of a loaf of Mead's Fine Bread from you, paying you five dollars for it! Of course, if you don't have the loaf of Mead's Bread, you cannot make the sale to the Mystery Woman. All you need to be sure of is that you have at least part of a loaf of Mead's Fine Bread in your house, so that you can sell it to the Mead's Fine Bread Mystery Woman when she calls at your door. And remember—she will gladly pay you five dollars for it! You may have the opportunity to sell a loaf of bread for five dollars! * * * Listen again tomorrow at this time for your program of KEEP FIT TO MUSIC, brought to you by the makers of Mead's Fine Bread. And remember—To better serve your baking needs, the better bread you need is Mead's!

Time of Broadcast----- Announcer

53

KWFT

CONTINUITY

Advertiser: Mead's Bakery.

Date-----

Time----- Type-----

Everyone is talking about the Mead's Fine Bread Mystery Woman. Have you seen her? She may call at your door today—and if you can show her a loaf or part of a loaf of Mead's Fine Bread in your house, she will gladly pay you five dollars for it!

There is no catch whatsoever about this statement. Just be sure you have at least part of a loaf of Mead's Fine Bread in your home, so that you can show it to the Mead's Fine Bread Mystery Woman when she calls at your door. It will be an exciting experience to sell a loaf of bread for five dollars! . . . Listen again at this time tomorrow for your program of **KEEP FIT TO MUSIC**, brought to you by the makers of Mead's Fine Bread. And remember—To better serve your baking needs, the better bread you need is Mead's!

Time of Broadcast----- Announcer-----

54 NAMES OF PERSONS WHO HAVE SOLD A LOAF OF MEAD'S BREAD
(OR PART OF LOAF) FOR FIVE DOLLARS (TO MYSTERY WOMAN)

* Mrs. A. D. Foster, 2207 Bridwell.
Mrs. K. O. Thompson, 309 N. Austin.
Mrs. Essie Hancock, 1606 Monroe.

55 JOE A. FAUCETT
COUNTY ATTORNEY
Howard County
BIG SPRING, TEXAS, *December 11, 1939.*

Hon. W. A. ABBOTT,
*Inspector, Federal Communications Commission,
U. S. Terminal Annex Building, Dallas Texas.*

In Re: Radio Station KBST, Big Spring, Texas.

DEAR SIR: To your request in our conversation this day regarding the Lottery Broadcast of Radio Station KBST, Big Spring, Texas, I herewith submit to you a more detailed statement regarding this matter.

Each day over this station, through spot broadcasts, Mead's Bakery, Big Spring, Texas, has the following announcement, in substance as follows:

"Here's big news from Meads news about Meads Fine Bread's Mystery Woman. She May call at your door today, and if you can show her a loaf or a part of a loaf of Meads Fine Bread in your house, she will gladly pay you five dollars for it. There is no catch whatsoever about this statement. Just be sure you have at least a part of a loaf of Meads Fine Bread in your home, so you can show it to Mead's Fine Bread's Mystery Woman when she calls at your door. It will be exciting to sell a loaf of bread for five dollars. Watch for Meads Fine Bread's Mystery Woman. She may call on you today: This offer is limited to the Big Spring Territory."

Thus, you can see that this concern is offering a prize of Five Dollars daily to a person who buys their bread, should this person

by chance have the bread in their possession, should the mystery woman, by chance, call at their door.

56 Mr. Abbott I would appreciate your attention to this matter, as in my opinion it absolutely a violation of your statute, and I know that you can effectively punish this concern as well as the station should you think necessary.

Perhaps you are wondering why I do not file a complaint under the State Lottery Law. Therefore, I wish to make this statement in regards thereto. Should I file such a complaint the defendants could and would easily come to the Courthouse, make bond, and go about their way continuing to run the Lottery, and thus receive the benefits of the publicity that my complaint would give them, and in the end they would only be facing a small misdemeanor complaint under the state law. While, on the other hand, you have it in your power to cause them to be forced to go to Abilene, Texas, under a Federal Warrant (which incidentally scares a sensible man to death), to face a Federal District Judge (not a local kin folks jury), and submit to a thousand dollar fine for each days violation, also the possibility of a forfeiture of the rights of the Radio Station.

Mr. Abbot should your department see this as I do, I would certainly recommend the imposition of a fine on the bakery to say the least, since I have warned them, begged them, and they continue in open defiance.

Perhaps some day the State Courts will wake up and have efficient power, or at least probative force, and at that time I will not have to call for your intervention, but until then I beg to do so. Since you have indicated that your department is interest in this type of case, I have done the right thing in reporting it, therefore, I have that consolation to say the least.

I promise to have you a case for each days violation.

Thanking you in advance for your cooperation, I beg to remain,
Very truly yours,

JOE A. FAUCETT.

57

STATION WRC, WASHINGTON, D. C.

(8:30 P. M.)

POT OF GOLD PROGRAM

Theme Song

Announcement

Music

HORACE HEIDT. Thank you, and hello, nice people. This is Horace Heidt hardly able to speak from excitement because there is \$1,900 in the Pot of Gold tonight. \$1,900! Boy, oh boy, oh boy, and a wow. And now while we are wondering who's going

to get all that money, we'll start the show with a modern arrangement of "The Merry Wives of Windsor." Gentlemen, to the ladies!

Music

HORACE HEIDT. Here's Ben Grauer, the lad with the \$1,900 voice to tell you about tonight's Pot of Gold.

BEN GRAUER. Thank you, Horace, and I may have a \$1,900 voice all right, but I know a lady with a \$900 dog.

HORACE HEIDT. Say, that's some dog, Ben. Tell us more.

BEN GRAUER. I'll tell you about her and the dog later on. In fact, she's going to be on the show tonight but first let me tell the folks that tonight we want to make an outright gift of \$1,900 in cash to somebody in the United States. Now, this is not a contest of any kind. There is nothing to do. Nothing to buy and no letters to write. All we are going to do is make a telephone call right here from the studio. If that telephone answers, we are going to send immediately by Western Union \$1,900 to the person listed under that telephone number in the phone book which we have here in the studio, or, if for any reason the phone does not answer or the number is not reached when we call, we'll send \$100 anyway and we'll add \$900 to next week's Pot of Gold, making a total of \$2,800 we want to give away as an outright gift on this program next Tuesday night. Now, remember, there is nothing for you to do and if you stay with us you'll find out just how we select that telephone number. Well, that's all I have to say about that, Horace.

58

Music

HORACE HEIDT. Well, Ben, thanks. Say, how about that lady with the \$900 dog?

BEN GRAUER. Not yet, Horace. It's time for music right now and that's your department.

HORACE HEIDT. Okeh. Have it your way. Say, Larry, you know Madame Graver who wrote "Tippi Tin" has written a wonderful new song, "Make Love With a Guitar." How about you singing it for the first time on the air.

LARRY. Horace, I'll consider it an honor to do just that for Madame Graver.

Music

Commercial Announcement

Music

"* * * Now before we start our search for the person to whom we want to give that money, I'm going to pin Ben Grauer down about that lady and the dog story.

BEN GRAUER. Well, there is no need to do that, Horace. Here I am, ready to tell all.

HORACE HEIDT. Well, what's it all about.

BEN GRAUER. Horace, you remember last week we tried to call Miss Lillian Gans out in Marietta, Ohio?

HORACE HEIDT. Yes, but nobody answered.

BEN GRAUER. Well, the lady who didn't answer the phone is standing next to me here and she wants to meet you. Miss Gans, this is Horace Heidt.

LILLIAN GANS. How do you do, Mr. Heidt.

HORACE HEIDT. Well, how do you do, Miss Gans. Say, would you mind telling us what you do.

LILLIAN GANS. Well, I'm a court stenographer, Mr. Heidt, and I am also a writer, and believe it or not, one of my scenarios is entitled "The Pot of Gold."

HORACE HEIDT. Now, that is a coincidence. * * * Say, Ben, now that I have met the charming lady, where does the dog come in?

BEN GRAUER. Well, right here. Miss Gans, would you mind telling Mr. Heidt and the radio audience why you didn't answer your phone last Tuesday?

LILLIAN GANS. Well, you see, my brother and I live together and last Tuesday we were both away from home. My brother returned first and took Michael O'Halloran out for a walk.

BEN GRAUER. And Michael O'Halloran is—

LILLIAN GANS. My terry blue dog. Well, you see, as my brother was out on the porch he thought he heard the phone ringing. He decided it wasn't and went on with the dog.

BEN GRAUER. With the terry blue dog. That was our call.

LILLIAN GANS. That's right. While you were trying to get me, my brother was out walking with the dog.

HORACE HEIDT. With the terry who blew the \$900.

BEN GRAUER. Well, there, Horace, there you have the story of the lady with the \$900 dog.

* * *

We also have here in the studio the Tum's giant selector and Larry Cotton is going to spin the selector so we can pick a volume of the telephone book. All right, Larry, let her go.

There it goes, Horace. There it is. Looks like it's going to be a good spin this time. What is it this time? It's coming down to the big numbers. It's going to stop at one of the big numbers. No, it isn't. It's down to the 120; no, it's down to 10; it's 108.

BEN GRAUER. No. 108, which means that the phone book we are looking for is in Vol. No. 108. Have you got that, Ben?

BEN GRAUER. Sure, I have, Horace.

Music

BEN GRAUER. Now we found the right volume of phone book, so next we want to find a particular page in that volume and the Tums giant selector does it for us. All right, Larry. Let's have it again.

60 Here we go. This one takes a little more time, Horace, but it's slowing down. It's going to slow down now. It's going down to the small numbers. No, it's coming back to the center of the wheel. It's going to stop at 200, I believe. No, it's at the top of the 200's. No, it went across the line and it's 301.

And it's page 301. You see, the selector stopped at No. 301, which means that the person we are after tonight is listed on page 301 in Vol. No. 108, the volume that was selected in our first step. Have you got that, Ben?

BEN GRAUER. Yes, Horace Heidt, page 301 of Vol. 108. I'm checking it right now.

HORACE HEIDT. Okeh, carry on, Ben.

Music

Commercial Announcement

Music

* * * Now, back to that \$1,900. Our first step gave us Vol. No. 108. Our second step gave us page No. 301, so we're ready for the next and most exciting step in the search to select the person on page 301 whom we're going to call on the phone, so we call on the Tums Giant selector again. Larry, let's have the big spin of the evening.

* * * They're off. * * * and it stops on number 7.

BEN GRAUER. Number 7. That means that the person we are looking for is the 7th listing on page 301 in phone book Vol. 108 starting from the top left of the page and counting down to the 7th listing. Of course, we are only interested in what appears in the phone book to be personal listings, not institutions or business firms. Well, we want to make doubly sure about all this for there are \$1,900 involved and that is worth a check and a double check. * * *

Music

Commercial Announcement

Music

61 BEN GRAUER. Okeh, Horace. Everything's checked. Listing 7 on page 301 in phone book Vol. 108 is the one we are after. Suppose you play something, Horace, and I'll put in a phone call right now. "Hello."

Music

BEN GRAUER. Hello, is this Stamford, Conn., 44598? Well, this is Ben Grauer calling from the Tums "Pot of Gold" program in Radio City, New York. We are sending \$1,900 immediately by Western Union to Mr. Sidney Anthony whose name is listed under this telephone number. Is Mr. Anthony there. Is she Mrs. Anthony? Is she his wife? Well, get her to the phone quick. She'll be awful glad to hear what I've got to tell her. You bet. I don't know how this little boy or girl but she seemed kinda uncertain about what I was saying. Hello, Mrs. Anthony. This is the Tums Pot of Gold program, Ben Grauer speaking. Have you been listening to the radio? Well, have you heard about our Tums Pot of Gold? Yes, you are the lucky person. \$1,900, madam. Yes, madam, you are receiving this outright gift of the Tums people. One thousand nine hundred dollars. Now, I'm not kidding you. How do you feel? Really, I'm—that would be—No, I'm not kidding. There are a lot of people listening to me, if not to you. Tell us, how do you feel? Yeh, you feel fine. Well, you'll feel much better when that Western Union boy comes. Tell us, what does Mr. Anthony do? Is he a businessman? He moves houses! Well, he's got something to move into his house. It will be there in just a few minutes. Our very warmest congratulations and best wishes from the Tums people. You give him the good news when he comes in but have a chair handy for him. Bye-bye, Mrs. Anthony. Well, folks, we did it again. Position No. 7 on page 301 in phone book Vol. No. 108 turned out to be Mr. Sidney Anthony, 374 West Ave., Stamford, Connecticut, whose telephone number is Stamford 44598. The \$1,900 is on its way to Mr. Anthony right now. And, by the way, Vol. 108 contains 2 other communities in addition to that of Stamford and its surrounding territory. Well, Horace, we did it again. How about some music?

Music

62

Exhibit E-2 to affidavit

40315

DEPARTMENT OF JUSTICE,
Washington, D. C., April 10, 1940.

HONORABLE JAMES LAWRENCE FLY,

*Chairman, Federal Communications Commission,**Washington, D. C.*

DEAR MR. FLY: Reference is made to our letter of February 21, 1940, acknowledging receipt of yours of February 19, 1940, transmitting for such action as the Department may deem appro-

prate certain information concerning the broadcasting of the "Pot o' Gold" and "Mead's Bakery" programs, both of which are alleged to be in violation of Section 316 of the Communications Act of 1934.

After a thorough examination of the material submitted and a careful consideration of the facts presented, the Department has concluded that prosecutive action under Section 316 of the Communications Act of 1934 in these two matters should not be instituted.

Respectfully,
For the Attorney General:

(Signed) O. John Rogge,
O. JOHN ROGGE,
Assistant Attorney General.

64 *Exhibit F-1 to Affidavit*

MARCH 29, 1940.

The Honorable the ATTORNEY GENERAL,
Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL: The Commission is in receipt of information indicating that a program broadcast by Station KRLD, Dallas, Texas, entitled "Dixie Treasure Chest," is in violation of the provisions of Section 316 of the Communications Act of 1934. Attached hereto is a summary of facts concerning this program, together with the continuity thereof.

This matter is transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in this matter which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY, *Chairman.*

Attachments.
PWS/ao'd.

65 SUMMARY OF FACTS CONCERNING A PROGRAM KNOWN AS "DIXIE TREASURE CHEST," BROADCAST BY STATION KRLD, DALLAS, TEXAS

KRLD Radio Corporation is the licensee of Radio Station KRLD, Dallas, Texas. The above program was broadcast by Station KRLD on January 10, 17, 24, and 31, 1940. The continuity of one of these programs supplied by the licensee of the station shows in substance as follows:

During the broadcast of the above program a prize of \$25.00 is offered, under conditions hereinafter shown. If no listener

wins the \$25.00 it is carried over to the next week, and the amount to be distributed is cumulative. The continuity of this program supplied by the licensee shows among other things the following:

"Here is the simple procedure we use in giving this cash award from the open treasure chest. * * * We have a Dallas telephone directory here, and from it we will select a residence number—at random. If it is YOUR name, and if you answer the telephone and tell us you're listening to this program, you're eligible to win this handsome cash award of fifty dollars. All you will have to do is answer one simple question which I will ask. * * * and if you answer it correctly, the money will be rushed to your home *by special messenger* as soon as the program is ended!

"All set? Then Here GOES!"

The announcer ad libs, selects number from directory, calls, and if the party called answers the telephone, proceeds approximately as follows:

"Good morning, madam. Are you listening to the Dixie margarine show on KRLD? (If 'No')—I'm awfully sorry, ma'am, because if you had been, you would have been eligible for a fifty dollar cash award! I tell you what I'm going to do. * * * I'd like to send you a pound of Dixie Margarine, with our compliments. * * * try it, and see if it's not the best you've ever used! And be sure to listen to KRLD next week at this same time. Better luck next time!"

The question propounded to the telephone subscriber in this particular program was "What Is the Color of the Border of the Dixie Margarine Package?" If this question had been answered correctly, a prize of fifty dollars in this instance would have been awarded.

It will be noted that the telephone number of the party to be called is selected at random, and the prize will not be awarded unless the party answers and gives a correct answer to the question propounded. The element of chance is found in the manner of selecting the telephone number to be called, whether or not the subscriber will answer, and whether or not the subscriber will be listening to the particular program. The distribution of Dixie Margarine to all parties who are telephoned is likewise dependent upon chance, first in the manner of selecting the telephone number, and second, as to whether or not the party answers the telephone.

Client: Titus Distributing Co.

Product: Dixie Margarine.

Program: Dixie Treasure Chest.

Date: January 17, 1940.

Announcer: Kuler.

Continuity: Geo.

Production:

Time: 9:45 a. m.

SOUND. Telephone Rings:

ANNOUNCER. That ring is for you madam! And I hope you're at home, because we're about to open THE DIXIE TREASURE CHEST!

THEME. W 106-1 (Evolution of Dixie—start on drum-roll—fade:) (aprx. 30 sec.).

ANNOUNCER. The Dixie Treasure Chest, ladies! With a cash award of Fifty dollars for some lady who's at home listening to this broadcast, and who will answer just one question your Dixie announcer will ask! Last week's award of \$25.00 was carried over to this week, so that today's the Dixie Treasure Chest holds fifty dollars. If the award isn't claimed on this broadcast, another \$25.00 will be added next week. How do you get it? I'll tell you in just a moment. Just be sure to stay with us, and listen closely! This program is presented each Wednesday by the makers of Dixie Margarine—the all-purpose, all American spread. And ladies, this program isn't the only treasure chest that Dixie gives you. There's Dixie Margarine itself—a treasure in your kitchen, or for table use * * * as fine an All-American spread as you'll find anywhere. And then there are the valuable coupons found in every pound package of Dixie Margarine, coupons that are extra valuable, good for such treasured merchandise as:—a two-quart aluminum stewer, a useful utility Pyrex dish, a Pyrex pie-dish, and many others that you can get for just a few Dixie
67 Margarine coupons. Try DIXIE next time! You'll find it pays!

THEME. Back Up. 30 sec.—Out.

ANNOUNCER. Now, let's get down to the business of the Treasure Chest! Here is the Dixie Treasure Chest before me * * * and in it is Fifty dollars, in crisp new bills. Fifty dollars that the makers and the dealers who sell Dixie Margarine are going to give you on this program!

Here is the simple procedure we use in giving this cash award from the open treasure chest * * * We have a Dallas telephone directory here, and from it we will select a residence number—at random. If it is YOUR name, and if you answer the telephone and tell us you're listening to this program, you're eligible to win this handsome cash award of fifty dollars. All you will have to do is answer one simple question which I will ask * * * and if you answer it correctly, the money will be rushed to your home by special messenger as soon as the program is ended!

All set? Then Here GOES!

(Announcer: Ad lib, selects number from directory, calls, and if call is answered follows approximately one of these routines:)

ANNOUNCER. Good morning, madam. Are you listening to the Dixie Margarine show on KRLD? (IF "NO")—I'm awfully sorry, ma'am, because if you had been, you would have been eligible for a fifty dollar cash award! I tell you what I'm going to do. * * * I'd like to send you a pound of Dixie Margarine, with our compliments * * * try it, and see if it's not the best you've ever used! And be sure to listen to KRLD next week at this same time. Better luck next time!

68 ANNOUNCER (if "Yes"). That's fine! You've practically got fifty dollars in your purse right now—I hope! All you'll have to do is to answer *one* question for me—and quicker than you can say "Jack Robinson", the fifty dollars will be in your hands. By the way, are you a Dixie Margarine user? (You don't have to be, but it'll help if you are.) Anyway, I'm sure you've seen Dixie Margarine on display at your grocers. Tell me—what is the color of the border on the Dixie Margarine Package? (If the answer is "Green" congratulate the lady. Get her to confirm her name and address, go into plug below.) (If the wrong answer is given, follow same procedure until the money is given, or the time is up.)

ANNOUNCER (2nd Plug). Careful housewives, in buying foods for their families, try to keep on hand plenty of basic foods—good milk, fresh eggs, fruits—and a good spread for general purposes and for use in the kitchen. WISE Dallas housewives are choosing DIXIE MARGARINE for this spread. They find it pays in more ways than one. In the first place, you can't buy a finer, better all-purpose, All-American spread. Then, in every package is a coupon good for the finest merchandise premiums. Just a few of these coupons are good for such fine household items as a utility Pyrex dish, a 2-quart genuine aluminum saucepan, and many others. Take a tip from these wise buyers. Get a pound of DIXIE MARGARINE from your grocer today. And take a tip from me—When you get that package, examine it closely.

69 You don't have to buy to win on the Treasure Chest program, but it's a pretty good idea to get acquainted with Dixie Margarine. Look it over next time you visit your grocers! And be sure to tune in again next Wednesday at 9:45 a. m. and we'll open the DIXIE TREASURE CHEST again to give away \$-----.

THEME. W 106-1—Fade for:

ANNOUNCER. Well our Dixie Treasure Chest (did/did not) pay out \$50 today, so next week's award will be \$-----. Be sure to plan on staying close by your radio next Wednesday morning.

Maybe YOU will be just that much richer for listening. In the meantime, don't forget to ask your grocer for DIXIE Margarine. We know you'll like it! Until then, this is Fritz Kuler, your Dixie Announcer, saying goodbye, and—good luck!

70 *Exhibit F-2 to affidavit*

OJR: CEB: jb
82-73-5

DEPARTMENT OF JUSTICE,
Washington, D. C., April 29, 1940.

Honorable J. L. FLY,
Chairman, Federal Communications Commission,
Washington, D. C.

SIR: Reference is made to your letter dated March 29, 1940, together with inclosures, indicating that a program broadcast by Station KRLD, Dallas, Texas, entitled "Dixie Treasure Chest" is in violation of the provisions of Section 216 of the Communications Act of 1934.

Please be advised that careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department.

Respectfully,
For the Attorney General:

(S) O. John Rogge,
O. JOHN ROGGE,
Assistant Attorney General.

72 *Exhibit G 1 to affidavit*

MARCH 29, 1940.

The Honorable The ATTORNEY GENERAL,

MY DEAR MR. ATTORNEY GENERAL: The Commission is in receipt of information indicating that a program broadcast by Station WISE, Asheville, North Carolina, entitled "Sears' Grab Bag", is in violation of the provisions of Section 316 of the Communications Act of 1934. Attached hereto is a summary of facts concerning this program, together with the continuity thereof.

This matter is transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in this matter which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY,
Chairman.

Attachments.

73 SUMMARY OF FACTS CONCERNING A PROGRAM KNOWN AS "SEARS' GRAB BAG" BROADCAST BY STATION WISE, ASHEVILLE, NORTH CAROLINA

Harold R. Thoms is the licensee of radiobroadcast Station WISE situated at Asheville, North Carolina. The above program was broadcast by Station WISE beginning November 9 through November 18, 1939.

The Commission received a complaint concerning the broadcast of the program shown above, alleging that such broadcast was in violation of Section 316 of the Communications Act of 1934.

The Commission is in receipt of a letter dated February 3, 1940, from the licensee of Station WISE describing said program, which shows in substance as follows:

On the date of the broadcast a box was placed near the front door of the Sears' store. This box contained a number of slips of paper, with a number on each slip. Any one desiring to participate in the drawing could take one of these slips of paper from the box. It was not necessary to purchase any merchandise. On the day prior to the broadcast, certain numbers had been selected at random by the advertising manager of Sears' store. These numbers so selected constituted the numbers that would be called during the broadcast for the distribution of prizes. During the broadcast the announcer would pick one of these pre-selected numbers and ask the audience if any one had that number. If no one held that particular number the person holding the number nearest to that number determined the winner of the prize—an article of merchandise. These prizes ranged in value from 26 cents to \$1.00. There were from four to six prizes distributed each broadcast.

The Commission is in receipt of an additional letter, dated February 3, 1940, from the licensee of Station WISE, in which it is stated: "The management of this station desires to advise the Commission at this time, that this program will not again be broadcast over the station, either for the same or any other advertiser."

74

[COPY]

CONTINUITY

WISE

Advertiser Sears' Grab Bag
Time 11:30 A. M.

Dates Nov. 14 & 15, 1939.
Announcer B. Cacy.

(Opening Announcement):

Good morning, ladies and gentlemen—we are speaking to you

from the rug and furniture department of Sears' big store on Haywood Street here in Asheville. This is the fifth (sixth) day of Sears' great Super-Value Sale—the sale that is scheduled to run for five (four) more days, including today. Right now, we are about to start the fifth (sixth) of Sears' free drawings—one of the big features of this sale—it's big for you because you don't have to spend one penny to win one of these Grab Bag Prizes, and there are some mighty swell ones here at my left which the folks here can all see. For those of you who haven't heard the details of this free drawing, let me explain in just a few words. Each morning during this sale we will have this Grab Bag drawing at 11:30, and when you enter Sears' Store, you will find a box at the entrance containing slips of paper upon which are numbers. Reach in and get one, and only one. It doesn't cost you a penny to do it. Then keep that slip and number until we come on the air with the Grab Bag Program here in the rug and furniture department. Certain numbers will be called and those having the number closest or the exact number will get to draw for a prize—and a really worth while one too.—Editor.

75 (Close):

Thank you a lot folks for being here, and if you can get out of the store without taking advantage of some of these super values, I'll certainly be surprised. And don't forget that we will be back here tomorrow morning at 11:30 and each morning thereafter for the balance of the week to broadcast the Grab Bag drawing every day, and those of you who visit us during the broadcast won't have to pay out a cent to win something—something really worth while. So, be sure that you get your number when you enter Sears' Store on Haywood Street tomorrow morning—and we'll be seein' you on the air at 11:30 from WISE, Asheville.

76

Exhibit G-2 to affidavit

OJR:CEB:jb
82-55-3

DEPARTMENT OF JUSTICE,
Washington, D. C., April 29, 1940.

Honorable J. L. FLY,
*Chairman, Federal Communications Commission,
Washington, D. C.*

SIR: Reference is made to your letter dated March 29, 1940, together with inclosures, indicating that a program broadcast by Station WISE, Asheville, North Carolina, entitled "Sears' Grab Bag" is in violation of the provisions of Section 316 of the Communications Act of 1934.

Please be advised that careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department.

Respectfully,

For the Attorney General:

(S) O. John Rogge,

O. JOHN ROGGE,

Assistant Attorney General.

78

Exhibit H-1 to affidavit

MARCH 29, 1940.

The Honorable the ATTORNEY GENERAL,
Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL: The Commission is in receipt of information indicating that a program broadcast by Station WFIL, Philadelphia, Pennsylvania, entitled "Especially For You," is in violation of the provisions of Section 316 of the Communications Act of 1934. Attached hereto is a summary of facts concerning this program, together with the continuity thereof.

This matter is transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in this matter which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY,

Chairman.

Attachments.

PWS/ao'd.

79 SUMMARY OF FACTS CONCERNING A PROGRAM KNOWN AS
"ESPECIALLY FOR YOU," BROADCAST BY STATION WFIL, PHILADELPHIA, PENNSYLVANIA

WFIL Broadcasting Company is the licensee of radiobroadcast Station WFIL, situated at Philadelphia, Pennsylvania. The above program was broadcast by Station WFIL six days each week, Monday through Saturday, during the period October 3, 1939 to approximately February 1, 1940.

The continuity of this program supplied by the licensee of Station WFIL shows in substance as follows:

That the station has secured and has in the studio the Philadelphia city and suburban directories; that some kind of a wheel is used to determine the person who is to be given a chance to win a Farnsworth Radio. This wheel is whirled first to find the number of the page in the directory; it is whirled a second time to determine the column on the page selected by the first whirl of the

wheel; and is whirled a third time to determine the number from the top of the column which will give the name and address and telephone number, if any, of the party so selected. If the party selected has a telephone he is called, and if he answers the telephone two questions are propounded: First, "Is your radio turned on?"; second, "To what station are you listening?" If the party is listening to WFIL, a Farnsworth radio is given to the party. There is no requirement that any purchase be made or that any coupons or facsimiles be supplied. If for any reason the party called by telephone does not respond he will be given two tickets to the "Mystery History," a network show which is given by Station WFIL every Sunday at 2:00 p. m.

If the party answering the telephone is not then listening to Station WFIL the chance of winning a Farnsworth radio is lost but the party will receive the two tickets to "Mystery History." The station also broadcasts information concerning those who have won a Farnsworth radio in accordance with the description of the program heretofore shown.

80

WFIL RADIO AWARDS PROGRAM

JANUARY 26, 1940.

ANNOUNCER. WFIL RADIO AWARDS is on the Air!

THEME. "Especially for You."

ANNOUNCER. * * * And I might add especially for you. That is the name of our theme, you know, "Especially For You." It really typifies the program for the program is "Especially for You." * * * So too might I include two very beautiful Farnsworth Radio Table Models, the last word in efficiency and beauty. The name Farnsworth insures that. After all Farnsworth is the most distinguished name in the realm of Television, now introducing the radio receiver of tomorrow. Each day at 12:00 o'clock and again at 3:30 o'clock, WFIL goes before its microphones to present to you, our listeners, these splendid radios * * * two of them will be given away in the next thirteen minutes. I too hope sincerely one of them goes to you. To those of you who are familiar with the setup, the explanation is perhaps not needed. The chances are that there might be someone among you who happens to be unfamiliar with the details of how we select the one to whom the radios must go. Lend an ear * * * Listen. Hear that sound in the background? It is caused by the whirling of a wheel. A wheel upon which three rows of numbers have been placed, numbers which correspond first to the page of the telephone book upon which your name I hope appears. Remember, we are using two books. The Philadelphia Directory and the Philadelphia Suburban Directory. That necessitated re-number-

ing the Suburban Directory so that the pages will run consecutively, bringing us a total of 1,032 pages. Having whirled the wheel first to find the number of the page, we whirl it again to find the column on the page. Naturally it must be one, two, three or four. So now we have the page and the column. Another spin of the wheel determines the number which we count from the top of that column. Counting down, we find ourselves with a name and address and a telephone number. We call the number gotten in the manner I have described over our dial phone similar to the one you have in your home or your office. I have one by my microphone here. We ask two questions. First, is your radio turned on? and secondly, to what station are you listening? If you are listening to WFIL, and in these days it seems that most everybody is, that is all there is to it. Nothing to buy, no coupons to clip or no facsimile to draw. We present you with one of these Farnsworth Radios.

If for any reason you should be listening elsewhere or say perhaps your phone is busy at the moment I call, mechanical defects intervene so I can't complete the call, you still receive an alternate prize * * * two tickets to "Mystery History" a network show over this station every Sunday at 2.00 o'clock. So you see that everyone wins and it's lots of fun.

For those of you who do not have telephones as well as those of you who do, we have the Mystery-Man, the fellow who plays the selections by transcription and defies your memory. If you remember the titles, jot them down, there are three of them, you know, and mail them to Radio Awards. Whatever radios I fail to give away by means of the telephone calls, we will give away through the medium of the Melody Man. So * * * be ready will you? And now let's announce the winners for Monday at 12:00 o'clock. The selections played and unannounced were as follows: "Mandy", "Chatterbox" and "The Continental". One winner on that show Mrs. Carolyn C. M. Rice, 5928 North Seventh Street, Philadelphia, Pa.

81 Monday at 3:30, the selections played: "Under a Blanket of Blue", "My Own", and "Love and a Dime." The winner, Lee Breese, 6845 Limekiln Pike, Germantown, Philadelphia, Pa. Congratulations to you sir. Tuesday at 12:00: the selections first, "Faithful Forever", "The Shiek of Araby" and "The Little Red Fox". Congratulations to Reba Courtney, Lecony Plaza, 58th and Hoffman Streets, Philadelphia, Pa. Two winners on this show, by the way, Margaret L. Hagenor, Bellrich Apartments, 15th & Spruce Streets, Philadelphia, Penna.

82

Exhibit H-2 to affidavit

OJR:CEB:jb

82-62-8

Honorable J. FLY,

*Chairman, Federal Communications Commission,
Washington, D. C.*

DEPARTMENT OF JUSTICE,

Washington, D. C., April 29, 1940.

SIR: Reference is made to your letter dated March 29, 1940, together with inclosures, indicating that a program broadcast by WFIL, Philadelphia, Pennsylvania, entitled "Especially for You" is in violation of the provisions of Section 316 of the Communications Act of 1934.

Please be advised that careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department.

Respectfully,

For the Attorney General:

(S) O. John Rogge,

O. JOHN ROGGE,

Assistant Attorney General.

83

Exhibit I-1 to affidavit

MARCH 29, 1940.

The Honorable the ATTORNEY GENERAL.

MY DEAR MR. ATTORNEY GENERAL: The Commission is in receipt of information indicating that a program broadcast by Station WGN, Chicago, Illinois, entitled "Musico," is in violation of the provisions of Section 316 of the Communications Act of 1934. Attached hereto is a summary of facts concerning this program, together with a copy of the continuity thereof.

This matter is transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in this matter which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY,

Chairman.

Attachments.

JLMcD: ps.

84

Exhibit I-2 to affidavit

OJR:CEB:jb
82-23-9

DEPARTMENT OF JUSTICE,
Washington, D. C., April 29, 1940.

Honorable J. L. FLY,
Chairman, Federal Communications Commission,
Washington, D. C.

SIR: Reference is made to your letter dated March 29, 1940, together with inclosures, indicating that a program broadcast by Station WGN, Chicago, Illinois, entitled "Musico" is in violation of the provisions of Section 316 of the Communications Act of 1934.

Please be advised that careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department.

Respectfully,
For the Attorney General:

(S) O. John Rogge,
O. JOHN ROGGE,
Assistant Attorney General.

86

Exhibit I-3 to affidavit

H. W. KASTOR & SONS ADVERTISING COMPANY, INC.

RADIO DEPARTMENT

File 44-3 Musico

Client: National Tea Company.

Product: National Food Stores.

Program: No. 22—Musico.

Talent: Two Announcers.

Date of Broadcast: Friday, February 16, 1940.

Time: 8:00-8:30 P. M.

Outlet: WGN—Chicago.

Comments on Broadcast: Commercial Content: National Bakery Goods Offer: Angel Food Cake and pan rolls for 20¢.

Word Count: 620.

ANSON. You have a cushion of two songs, after each prize winning song has been played. Please be guided accordingly.

87 ANSON. (With music.) Ladies and gentlemen! Welcome to the world's newest and most fascinating prize game—Musico—with your Musico master, Bill Anson—Bob Elson—and Harold Stokes and his orchestra and a new surprise

feature. Musico, a game that anyone can win by just checking the names of songs. A half hour of thrills, fun, excitement. Draw up close, folks. Get your Musico cards and pencils ready. Join us in the big prizes that are given absolutely free.

(Pause.)

MUSIC. Seque Into Theme.

Theme Up.

Bring Under for.

ELSON. Ladies and gentlemen, this is Bob Elson speaking. I want to invite you to play Musico—brought you every Friday at this time by the National Food Stores. You simply play with Musico cards, which you get absolutely free at all National Food Stores in grocery and meat departments, and which are distributed house to house as well as at Station WGN. You don't have to buy a thing. Musico cards are free.

MUSIC. Theme Up and Out.

ELSON. Now listen carefully to the rules. As the orchestra plays a song check it off your card. The person who correctly checks all the numbers across row 2—the second row on your card and phones the correct list to our number first, Harrison 6912 is the winner of \$50.00 in cash. The person who correctly checks off all the numbers across the fourth row—row 4—and phones the correct list first, wins \$75.00 in cash. The person who

88 correctly checks off all songs across the 5th row of the card—row 5—and phones the correct list first wins \$25.00 in cash.

Now here is how you win grocery bags. If you correctly check the songs played across any row except row 1 you are the winner of a big bag of groceries. Then simply take your card to your nearest National Food Store before closing time tomorrow Saturday, February 17. You do not need to telephone to win grocery bags. And here's the grand cash prize * * * a big \$100 cash prize for those of you who check all songs across Row 1 or any other row on their Musico card and then write a slogan of 15 words or less on "I like Jumbo Twist Bread because —." Then write your name and address on the card and mail to: P. O. Box 6110A, Chicago, Illinois. The cards having the correct check-off of songs on row 1, or any other row and having the most unique and apt slogan will be declared winners of \$100 in cash. Remember, every Musico card is a possible winner of one of the prizes offered each week. So, even though you can't win every prize with every card, you may still win one of the prizes with any Musico card you get. You do not even have to have a Musico card to compete for a prize. If you have no card, simply list all the songs played on tonight's program in their correct order and send it in with your slogan of 15 words or less. All slogans must be mailed before midnight to-

morrow (Saturday). The decision of the judges will be final in every case. o grocery bags will be given on row 1. Do not
 89 call up on row 1. Submit a slogan on Row 1. Musico is a game of skill * * * a quiz game you can play at home.

ORCHESTRA. Theme Up and Out.

ELSON. And now, without further ado, I bring you that musical playboy, the little man who's always there, your Master of Musico, Bill Anson.

ANSON. Well—thank you Bob and good evening one and all. Welcome to another of our big Musico parties. And folks, tonight our Musico party is going to be bigger and better than ever because we have a grand new Musico feature that—well, I'll tell you about it a little later. Now—has everybody got their Musico cards and have you all put big circles around tonight's three cash rows? They're 2, 4, and 5. That's right * * * 2, circle * * * 4, circle, and 5, circle. Here comes our first big number so—Strike up the band for Musico.

ORCHESTRA. Lovely To Look At.

ANSON. Yes, yes. The title of that song is what I told Hedy LaMarr—just before she shut the door in my face * * * You're Lovely To Look At. Yes, You're Lovely To Look At was the title of that song. So if you've got it on your Musica card, put a big X right over because that's how you win Musico. But from now on, I can't tell you the names of any more of the numbers because Musico is a game of skill so it's up to you to recognize the songs from now on. All clear? National presents Musico.

ORCHESTRA. Sing You Sinners.

90 ANSON. Did you recognize that song and did you mark it off on your card? If you haven't already done so—do it right away. And I hope that it was on the same line as the last one because that takes you one step nearer to winning one of those big prizes. So hurry up and fill a row—with National's big game—Musico.

ORCHESTRA. Sweet Sue.

ANSON. Well—if that wasn't Sweet, Sue me! Now let me remind you—as soon as you have five winners across rows 2, 4, or 5 on your Musico card, pick up that phone and call Harrison 6912 for a big cash prize. Tonight, row 2 pays \$50.00, row 4, \$75.00, and row 5, \$25.00. And there's a grand, grand prize of one hundred dollars for sending in a slogan with row 1. Set? Musico.

ORCHESTRA. Lullaby of Broadway.

ANSON. And now, ladies and gentlemen of Musico, it is my very great pleasure to bring you our big surprise feature of the evening—the Musico Masked Tenor. I say it's a pleasure for me to introduce him—I promise you, it'll be an even greater

pleasure for you to listen to him. Ladies and gentlemen, the Musico Masked Tenor.

Applause.

Our tenor will sing the next number in Italian. Ladies and gentlemen, Musico.

ORCHESTRA & TENOR. *Lamp Is Low.*

Applause.

91 ANSON. And that really was beautiful, wasn't it, folks?

Our Musico Masked Tenor will be back later in the show. In the meantime, don't forget—there are hundreds of prizes still waiting to be won—so on with the show. National brings you Musico.

ORCHESTRA. *Jubilee.*

ANSON. Ah, yes—and the title of that song is what a lot of Musico prizewinners will be having tonight. So watch those squares and song titles carefully—and grab your pencils because here comes another—Musico.

ORCHESTRA. *Merry Widow Waltz.*

ANSON. Well, mother and dad have danced to that tune many a time * * *. And some of us will be dancing to it too tonight if it puts a big X on one of those big cash rows. There's plenty of cash and stacks of groceries to be won when National brings you Musico.

ORCHESTRA. *Harbor Lights.*

ANSON. Now comes time again for another of our little Musico movies. Our scene tonight is the home of the world's greatest pessimist, Jeremiah Threadneedle. As we fade in, we find the eccentric old pessimist—played my myself—being interviewed by National's star reporter, Bob Elson played by—Guess who?—All set? Lights, camera, action.

ANSON. (Character * * * Fading in) So, young man, you say you are a newspaperman?

ELSON. I have, Bill—listen. Folks. * * *

ANSON. It might interest you to know that I'm an old newspaperman myself.

92 ELSON. Really, Mr. Threadneedle? Why did you quit?

ANSON. (Snapping) I found there wasn't much money in old newspapers.

ELSON. Oh.

ANSON. Besides, there's no real news in the world. No, sir! That's why I'm the world's greatest pessimist, Mr. Elson.

ELSON. The world's greatest pessimist, eh?

ANSON. Right! I'm the only man in the world who can look at a doughnut and only see the hole!

ELSON. You sure are a pessimist, Mr. Threadneedle. But you're wrong about there being no real news in the world.

ANSON. Bah!

ELSON. Because I've got some news that thousands of American housewives are going to welcome right now.

ANSON. If that's so—let's hear it!

ELSON. All right. Here goes:

93 ANNOUNCER. Attention, ladies, for news of a really amazing bargain offer. In order to get you acquainted with National's delicious line of bakery goods—we're going to let you in on a bargain that's just too good to miss! Listen to this! Tomorrow only—you can get a full dozen of National's delicious Pan Rolls for only one cent—with your purchase of National's 13 Egg recipe Angel Food Cake. Remember—this is a real, 13 Egg recipe Angel Food Cake. So soft, downy, and fine-textured, it fairly melts in your mouth. Made of the finest quality ingredients—and baked to perfection in National's own modern, sanitary bakery—its rich, appetizing flavor, and smooth velvety texture will bring smiles as bright as an April sunrise from everyone in your family. Remember—you get this big 13 Egg recipe Angel Food Cake—for only 19 cents. And, in addition, you get one full dozen of National's delicious Pan Rolls—for only one cent extra! Think of it! Rolls for Sunday breakfast—and a big, delicious 13 Egg recipe Angel Food Cake for Sunday dinner! Both for just 20 cents. But here's one word of warning. This amazing bargain offer is good for only one day—tomorrow—Saturday—February 17th. And, last time this amazing one cent offer was made—so many thousands took advantage of it—that our stocks were exhausted early in the day. Don't take chances on missing out. Do your week-end shopping early—at your neighborhood National Food Store. Get National's big, 13 Egg Recipe Angel Food Cake for only 19 cents. And—for just one cent more accept one full dozen of National's delicious Pan rolls.

94 ELSON. There, Mr. Threadneedle—what do you think of that for real news?

ANSON. By cracky, that's real news all right and I guess I'm not such a pessimist no more—but—

ELSON. What?

ANSON. To hear you mention that there thirteen egg recipe makes me wonder—

ELSON. Wonder about what?

ANSON. About my breakfast tomorrow morning—y'see, for twenty years, I've been such a pessimist that I've had to wear smoked glass at breakfast—I never could stand the sight of eggs sunnyside up!

ORCHESTRA. Finish chord.

ANSON. All right, folks—we're ready for another big Musico number, so grab your pencils and get ready to mark a big X on your card—Musico.

ORCHESTRA. Cowboy From Brooklyn.

ANSON. Now, let's see. We've only had one cash winner so far tonight. That means rows 4 and 5 are still open for cash awards. Row 4 pays \$75.00 and row 5, \$25.00. So as soon as you've checked all five songs across either of these rows, get to the phone and call Harrison 6912 right away. The first person phoning in the correct list of songs on either of these rows—that's 4 or 5—receives the cash award. The rest checking these rows win groceries. Do not call up if you have Musico on any other row. National brings you Musico.

ORCHESTRA. Wishing.

95 ANSON. And that, folks, is—what's the matter Bob. Folks, Reporter Elson seems to have something important to say—

ELSON. I have, Bill—listen. Folks. * * *

You may have attended a home luncheon demonstration, where they served a meal cooked in Castrite Waterless Cookware! Remember how delicious that food tasted! Well, here's grand news! You can now get Castrite Waterless Cookware at $\frac{1}{4}$ the former home luncheon demonstration price—on National's easy Card Plan! It's a marvelous bargain! Get your Castrite Cookware Card tomorrow—at your neighborhood National Food Store!

ANSON. Okay Bob! Now let's get on with—Musico.

ORCHESTRA. D'Lovely.

ANSON. And the title of that song is what you remark when our Postal Telegraph boy hands you a check for one of those big Musico cash prizes. You say it's—the title of the song! So let the big cash prizes flow—on National's big game—Musico.

ORCHESTRA. I Can't Give You Anything But Love.

ANSON. Ah, yes—And if you know what the Scotchman said to the bill collector—you know the title of that song. Well, folks, there's still hundreds of grocery bags to be won tonight—on every row, except row 1—that's the big \$100.00 row you mail in with a slogan. All set? Musico.

ORCHESTRA. Am I in Love.

ANSON. And now, folks, we'll all have the pleasure of listening to our Musico Masked Tenor again—he's going to sing the next number for us in his native Italian. The downbeat, please, Harold—Musico.

96 ORCHESTRA (TENOR). Temptation.

ANSON. Thank you sir * * * It's a pleasure for us to listen, I assure you—and what a break for our Italian listeners!

And now comes time again for a word from the only announcer who can successfully lay thirteen eggs on one program—Bob Elson.

ELSON. Don't forget that amazing bargain offer I told you about earlier tonight! Remember—tomorrow only—you will be able to get a full dozen of National's delicious Pan Rolls for only one cent—with your purchase of National's 13 Egg Recipe Angel Food cake! So tomorrow's one day you want to do your shopping bright and early, believe me! Last time we made this sensational bargain offer—so many thousands took advantage of it—our stocks were exhausted early in the day! And no wonder! Because I'm right here to tell you that this big 13 Egg recipe Angel Food Cake is just about the grandest cake you've ever had the pleasure of eating! It's rich, full flavored and so soft and delicately textured—it will capture compliments galore for you at your biggest Sunday dinner! And remember—you get this delightful treat—this big 13 Egg recipe Angel Food Cake—for only 19 cents! And in addition—you get a full dozen of National's delicious Pan Rolls—for only one cent extra! Imagine—delicious Pan Rolls that will really hit the spot at Sunday breakfast—and a big, taste-tempting Angel Food Cake for Sunday dinner—all for the amazing price of only 20 cents! This sensational one cent bargain offer is good for one day only—tomorrow—

Saturday, February 17th! Get your big 13 Egg receipt
97 Angel Food Cake—tomorrow! Pay just 19 cents! Then for just one cent extra—accept a full dozen of National's delicious Pan Rolls! But here's a friendly warning! These delicious cakes and rolls will be snapped up in a hurry! Shop early! Don't take chances on missing out!

ANSON. Thank you, Bob, that was beautiful. The way you described that cake makes me glad I don't have to be an angel to buy one tomorrow. Now let's get back to the show—National brings you—Musico.

ORCHESTRA. I'm Gettin' Sentimental.

ANSON. Lemme see—lemme see. That makes 15 big Musico numbers for tonight so far with the \$25.00 cash prize still waiting to be won. Not to mention the hundreds of grocery bags. So let's go—Musico.

ORCHESTRA. White Sails.

ANSON. And that one should have been fairly easy and, folks, let me remind you—even if you don't win a cash prize on any of the three cash rows on tonight's program, don't think you've been left behind * * * You haven't. Because if you correctly checked any of these rows you are still a winner. You can claim big shopping bags of groceries at your National Food Store tomorrow, Saturday, before closing time. And those grocery bags

are well worth winning, buh-lieve me. So let's get back in the groove with another—Musico.

ORCHESTRA. Sweet and Low.

ANSON. And what did that song do for you? Were you able to fill out a line? Don't forget that you can win \$100.00 in cash simply by filling out any line across and submitting a slogan of 15 words or less on "I Like Jumbo Twist Bread Because——" And now we bring back our Musico Masked Tenor to sing tonight's final song. Ladies and gentlemen—Musico.

ORCHESTRA AND TENOR. Goodnight Sweetheart.

ANSON. Thank you, sir—thank you very much. By the way, may I introduce myself—my name is Bill Anson. * * *

TENOR. (Short sentence fastly spoken in Italian.)

ANSON. Er—well—thanks anyway. Glad to know you. But, kidding, aside, folks, how did you like our tenor tonight? You did?

BUSINESS. Applause.

ANSON. Did any of you recognize the voice? Do any of you folks here in the studio audience have any idea as to who he is—even though he is masked? If you think you do know him—drop us a line on a postcard to Station WGN * * * Better still—write us anyway and let us know how you like his voice and if you'd like to hear him every week. Will you do that? * * * Thanks, that's swell. Now, you folks know that those who checked all songs across rows 2, 3, 4, and 5 tonight win one of those big shopping bags of groceries. Just take your Musico card to your National Food Store tomorrow, Saturday, before closing time. Those of you who succeeded in checking all songs across row one, mail in your card with your slogan of 15 words or less on: "I Like Jumbo Twist Bread Because——" and compete for that big \$100.00 prize. Now, don't forget to be back with us again next week. You will have another chance to win. And remember, too, you don't have to spend a penny to play Musico. You can get a card free just for the asking. And now, our cash winners for tonight were * * *

\$75.00 in cash for Line 4-----

\$50.00 in cash for Line 2-----

\$25.00 in cash for Line 5-----

The winner of last week's \$100.00 grand prize was-----
This is your Musico Master, Bill Anson, wishing you good luck until next Friday when we'll be back with more fun, thrills and surprises.

BUSINESS. Theme up and under.

ELSON. This is Bob Elson again, folks. I want to remind you that if you have checked all songs across rows 2, 3, 4, and 5 you have won valuable merchandise prizes. Take your Musico card

to your National Food Stores tomorrow, Saturday, before closing time. Get your Musico cards for next week right away. Musico cards are distributed in the vicinities of National Food Stores located in Illinois, Iowa, Michigan and Indiana. Next week's card will be pink and only pink cards will win. Get your pink Musico cards right away, tomorrow. They're free and you don't have to buy a thing. [Pause.] The fascinating new game of Musico is brought to you every Friday at this time by National Tea Company Food Stores. Music is under the direction of Harold Stokes. Play Musico and win. This is Bob Elson saying so long until next Friday night at 8.

100

1ST WINNER CARD

Winner! There's a cash winner in—and on line 2—the \$50 row! And the rest of you are prize bag winners. We do not know the name and address yet, but we will in a minute. Just as well hang up your phones folks, if you have checked all songs across line 2. The cash winner is in. The rest of you who checked this row win big shopping bags of groceries.

101

2ND WINNER CARD

Winner! There's a cash winner in—and it's on line 4—the \$75 row. We do not know the name and address yet, but we will in a minute. There's no need of phoning folks, if you've checked all songs across line 4. The cash winner is in! The rest of you who checked this row win big shopping bags of groceries!

102

3RD WINNER CARD

Winner! The last cash winner is in! The rest of you checking row 5 are prize bag winners. We do not know the name and address yet, but we will in a minute. You had just as well hang up your phones, folks, if you've checked all songs across line 5. The cash winner is in! The rest of you who checked this row win big shopping bags of groceries.

103

1ST CASH WINNER

Name-----

Address-----wins \$50 on Row 2, everyone else checking out this row wins grocery prizes. [Applause.] Congratulations. A Postal Telegraph boy will deliver a money order. And folks, if you have checked all songs across line 2 on your Musico card you can hang up. The cash winner is in. Remember, if you correctly checked this row, row 2, and did not win the \$50

cash prize—you still win grocery prizes. Take your Musico card to National Food Store tomorrow.

104

2ND CASH WINNER

Name_____

Address_____ wins \$75 on row 4. Everyone else checking out this row wins grocery bags. [Applause.] Congratulations! A Postal Telegraph boy is on the way with a money order for \$75. Folks, if you have checked all songs across row 4 on your Musico card, you may as well hang up your telephone receiver. You win grocery prizes even if you did not win the \$75 cash prize. Take your card to your National Food Stores tomorrow.

105

3RD CASH PRIZE

Name_____

Address_____ wins \$25 on Row 5, everyone else checking out this row wins grocery bags. [Applause.] A Postal Telegraph boy is on the way with the \$25 money order. And now that all 3 cash winners are in, our telephone girls are going home. No more calls will be received, so hang up your phone, folks, our board is closed. Yes, sir, I mean it * * * our board is closed. No more calls tonight.

106

Exhibit J-1 to affidavit

MARCH 29, 1940.

The Honorable the ATTORNEY GENERAL,
Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL: The Commission is in receipt of information indicating that a program broadcast by Station WIP, Philadelphia, Pennsylvania, entitled "Songo," is in violation of the provisions of Section 316 of the Communications Act of 1934. Attached hereto is a summary of facts concerning this program, together with the continuity thereof.

This matter is transmitted to you for your consideration and such action as you may deem appropriate. Please be assured that this Commission will render any assistance in this matter which you may desire.

Sincerely yours,

JAMES LAWRENCE FLY,
Chairman.

Attachments.
PWS: ahh.

107

Exhibit J-2 to affidavit

OJR: CEB: jb
82-62-9

DEPARTMENT OF JUSTICE,
Washington, D. C., April 29, 1940.

Honorable J. L. FLY,
*Chairman, Federal Communications Commission,
Washington, D. C.*

SIR: Reference is made to your letter dated March 29, 1940, together with inclosures, indicating that a program broadcast by Station WIP, Philadelphia, Pennsylvania, entitled "Songo" is in violation of the provisions of Section 316 of the Communications Act of 1934.

Please be advised that careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department.

Respectfully,
For the Attorney General:

(S) O John Rogge,
O. JOHN ROGGE,
Assistant Attorney General.

108

Exhibit K to affidavit

STOP THE MUSIC—RADIO

WJZ & NETWORK

Program No. 222

8: -9: 00 P. M. EST

June 22, 1952

Sunday

(Music. * * * Quick Attention Getter * * * Cut for * * *.)

Don. (With Excitement.) Attention, long distance operators from coast to coast! Stand by! In just a moment, calls will go out from our studio switchboard to all parts of the country! Please hurry the calls through—one of those calls may bring someone in your town a fortune in prizes now worth \$15,100! Okay, here we go * * * with the most exciting game in radio * * * Stop the Music!

(Music. * * * Sting and Build Under. * * *)

Don. * * * with Harry Salter's Orchestra, the songs of Dick Brown and June Valli * * * our Master of Musical Ceremonies, Bert Parks * * * and starring YOU * * * the people of America. [Applause * * * simultaneously with * * *.]

(Music. * * * "Strike Up the Band" * * *) [Applause.]

PARKS. Stop the Music! Hello, America, this is Bert Parks inviting you to play Stop the Music, ABC's national Sunday night game for the whole family * * * songs, music, and prizes * * * so get ready set * * * here we go * * * till we Stop the Music.

(Music. * * *) [Applause.]

109 PARKS. Well Dick Brown gets us off to a start with "The Merry Go Round Broke Down" * * * Now here's a lovely bit of stuff from our lively old maestro * * * swing it Harry Salter.

(Music. * * *) [Applause.]

PARKS. "That's A Plenty" and now coming up it's a musical state that's really great so let's ride with Harry and the orchestra.

(Music. * * *) [Bell.]

PARKS. Stop the Music! * * * Hello, operator, where is our first call to tonight please? Pittsfield, Massachusetts * * * all right, to speak to whom? Mr. Gilbert Lorne * * * Hello, Gilbert * * * how are you tonight, sir. Well, it's a pleasure to talk to you Gilbert * * * do you know who's calling? That's right * * * It's old Bert * * * How's everybody in your family, Gilbert? Good. And we're calling as you know on Stop the Music * * * we have a beautiful Snowwhite Perfection Electric Range that cooks by the clock while you rest or shop. What's the name of that song we were playing and the audience was helping us out with? "Deep in the Heart of Texas" * * * that's right. [Applause.] Here's our Mystery Melody * * * and you have the first opportunity tonight to identify that mystery melody for more than \$15,100 in prizes * * * here it is.

(Music * * * Mystery melody.)

110 PARKS. All right, Mr. Gilbert Lorne of Pittsfield, Mass., remember the first answer counts * * * what do you say is the exact title? * * * Now repeat that one more time * * * You don't know it * * * [Laughter.] Oh, I'm awfully sorry, Gilbert * * * anyway we're still going to send you that Perfection Electric Range and a treasure chest of Old Gold cigarettes * * * Thank you for joining us * * * Bye. [Applause.]

PARKS. Now, here's Juné Valli to sing.

(MUSIC. * * *) [Applause.]

PARKS. Oh, that's one of the greatest by the great team of Rodgers and Hammerstein * * * "June Is Bustin' Out All Over" * * * and now you know there are many ways to make love * * * say it with flowers, say it with poetry or say it with music like this * * * Dick Brown.

(Music. * * *) [Applause.]

PARKS. Very nice Dick * * * and it's called "Here In My Heart" * * * and now a touch of that old Latin rhythm * * * give us a beat and turn on the heat, Harry Salter.

(Music. * * *) [Bell.]

PARKS. Stop the Music! * * * Yes, operator, where to now, please? Right here in Forest Hills, N. Y. * * * All right * * * to speak to whom? Mr. Alfred Jacoby * * * Hello, Alfred * * * well I'm fine * * * where do you live in Forest Hills? 112th Street * * * What do you do, Mr. Jacoby?

Manufacturer of cotton dresses called "Faithful Frocks" * * * [Laughter.] Beg pardon * * * and sold in my hometown, too * * * well that's fine. Mr. Jacoby, as you know we're calling for Stop the Music * * * we have a beautiful 5 piece set of world famous Amelia Earhart luggage to carry with pride wherever you travel * * * do you know the name of that song? "The Carioca" * * * right. [Applause.] Yes * * * as you know, Mr. Jacoby, we have a jackpot that's been building up over a number of weeks, and now it's more than \$15,100 in prizes * * * do you think that you know the title of our Mystery Melody? * * * well, now wait * * * Alfred * * * hold on because we're going to play it for you * * * remember your first answer counts * * * think about now, because here it is * * *

(Music. * * * Mystery melody.)

PARKS. All right Mr. Alfred Jacoby in Forest Hills, Long Island * * * what is your answer? You say that the title is the "Sabre March" * * * no, I'm awfully sorry, Al, that isn't it * * * but we're still going to send along to you that Amelia Earhart luggage and a treasure chest of Old Gold cigarettes and thank you, sir, for joining us in Forest Hills. [Applause.]

PARKS. Friends, each week our telephone numbers are picked impartially * * * tonight's numbers were picked at random from our complete collection of U. S. Phone Books * * * naturally if you are in anyway associated with Stop the Music you are ineligible to win prizes * * * And friends, don't forget that nobody is called ahead of time * * * to participate on Stop the Music. None of our phone calls on these Sunday nights are made in advance * * * So stand by, because yours may be the next phone to ring * * * as we play Stop the Music and here is June Valli to sing for you.

(Music. * * *) [Bell.]

PARKS. Stop the Music! Yes, operator, where to now please? [Applause.] All right this time we go out to Tucson, Arizona * * * and who is waiting to talk to us? Mrs. Beulah Wesley * * * Hello, Mrs. Wesley * * * well I'm fine and what were you doing when we called besides listening to Stop the Music, Mrs. Wesley? You were going to take a ride in your new car? * * * oh, wonderful. When did you get it? Got it yesterday * * * well how's the weather out there in Tucson? How warm would you say? 109 * * * [Aud. Reaction.] Well you know it's

been awfully hot here today * * * too * * * [Laughter.] Just got out of a swimming pool * * * Mrs. Wesley, as you know this is Bert Parks on Stop the Music * * * we have * * * before you go out in the car * * * just want to * * * we have a Westinghouse Laundromat here that washes, rinses, damp dries and shuts itself off * * * do you know the name of that song?

113 Ma'am * * * "Be My Love" * * * that's right. [Applause.] All right * * * now if you know the title of our Mystery Melody * * * this will be the most enjoyable automobile ride you ever took in your life because here it is * * *

(Music. * * * Mystery melody.)

PARKS. All right there you are, Mrs. Wesley, out there in Tucson, Arizona * * * we hope you have it * * * what is the title? "The Victory March" * * * no * * * Beulah, I'm awfully sorry * * * beg pardon * * * oh, I am too * * * Sure we're going to send you the Westinghouse Laundromat for identifying the first song correctly * * * and a treasure chest of Old Gold cigarettes * * * thank you for joining us * * * hope you enjoy your new car. [Applause.]

PARKS. Now, for the first part of our exciting jackpot * * * listen to this.

(Music. * * *)

ANNCR. Yes, by the sea * * * a vacation for two especially provided by the Traymore Hotel of Miami Beach, Florida * * * You'll fly Safeway Travel Aircoach on one of their irregular flights to Miami Beach for two fabulous weeks of fun and entertainment all planned by the Traymore Hotel * * *

(Music. * * *)

ANNCR. Sweetheart of a prize from pure mild Sweetheart Soap * * * \$1000 deposited in your name in your favorite bank plus a full case of the big bath size cakes of Sweetheart * * * the bath and complexion soap used by 9 out of 10 cover girls for daily beauty care.

114 (Music. * * *)

ANNCR. You'll travel in style with a complete \$1,000 wardrobe of the world famous quality made Amelia Earhart luggage. Smartly styled Amelia Earhart exclusive creations you'll be proud to carry.

(Music. * * *)

ANNCR. From Bonny Belle a year's supply of their famous Ten-O-Six lotion that's perfect for sunburn and wonderful for your skin and you'll be a real Bonny Belle with \$500 spending money while in Florida.

(Music. * * *)

ANNCR. Candy for the kids * * * A sweet supply from Peter-Paul, makers of kitchen-fresh chocolate covered cocoanut Mounds

and Almond Joy candy bars * * * And Peter-Paul will also send you \$1,000 for a maid to look after the children.

(Music. * * *)

ANNCR. Also for the kids, a year's supply of delicious Zero frozen custard style dessert, the perfect texture dessert that's quick and easy to prepare and the makers of Zero are also sending you a \$500 credit for your local food store to complete your menus throughout the year.

(Music. * * *)

ANNCR. A prize for the whole family to enjoy * * * first for mother and dad * * * a matched pair of America's finest genuine Schwim Hornet bicycles fully equipped and two additional guaranteed Schwim bicycles for the kids * * *

(Music. * * *)

ANNCR. Dad could go fishing in style with world famous
115 Wright and McGill fishing equipment—rod, reels, eagle-claw, fishhooks, everything he needs and he'll also receive from Wright and McGill a new motor boat to continue your fishing for many years.

(Music. * * *)

ANNCR. Don't get frightened, you're not going to get a tiger, but you are going to receive one of the prettiest jungle pets this side of the tropics * * * a beauty, a fabulous scarlet Macaw, the most colorful of all tropical birds * * * tame, affectionate, she can talk, sing and whistle and she's all yours with the compliments of Tropical Hobby Land in Florida * * * world famous tropical zoo.

(Music. * * *)

ANNCR. That's only the first part of our jackpot, Bert Parks.

PARKS. OK, on with the show now till we Stop the Music. * * * Take it away Harry Salter.

(Music. * * *) [Applause.]

PARKS. Well, how about that. 'Course you're right if you said "Pennsylvania Polka" and now a declaration of undying affection and here to state the case for love, Dick Brown.

(Music. * * *). [Bell.]

PARKS. Stop the music. [Applause.]

PARKS. Now, where to operator * * * Thibodaux, Louisiana * * * all right and speak to whom? John Donnet * * * Hello

116 John. Well, I'm fine, sir. Tell me exactly where is Thibodaux, La.? 52 miles west of New Orleans. * * * Well, how many people in your town? How many * * * what's the population? Between 7 and 8 thousand * * * I see. Do you have a family, John. And what is your occupation? In the frozen food business. Oh, well, good for you. John, this is Bert Parks in New York on Stop the Music. We have a 124 piece set

of Brock California Farmhouse dinnerware, traditionally American in a gay sparkling pattern * * * do you know the name of the song Dick just sang? "Because of You" * * * well * * * [Applause.] All right, John, that means that you have an opportunity to identify that Mystery Melody * * * we sure hope you know it. Listen closely here it is.

(Music. * * * Mystery melody.)

PARKS. All right, John Donnet, down in Thibodaux, La., what is your answer? Pardon? It's from a Sousa March * * * No, I don't believe so, John * * * You don't know the title anyway though do you? I'm sorry but anyway we're still going to send to you the Brock Dinnerware and a treasure chest of Old Gold Cigarettes * * * and thank you, John, for joining us down there in Thibodaux, La. [Applause.]

(Music. * * *) [Applause.]

PARKS. Well either one, "The Eyes of Texas" or "I've Been Working On The Railroad" they're both OK * * * Now, ladies and gentlemen, in keeping with our feeling that occasionally you like to hear the better things * * *

117 [Laughter.] Wow wee * * *

(Music. * * *) [Applause.]

PARKS. That's from Gilbert & Sullivan * * * I'm awfully sorry * * * it's called "Titwillow" * * * Now we're off to a windy city and let's swing along with a song and Harry Salter.

(Music. * * *) [Bell.]

PARKS. Stop the Music! Yes, operator, where to now please? New Market, Va. All right to speak to? Mr. Robert Blackburn, how are you tonight? Well fine * * * it's a pleasure to talk to you, Bob * * * your family all right? Well, that's good. This is Bert Parks in New York and we have a beautiful ensemble of 6 Evans Silver automatic table lighters plus glamorous personal jewel accessories * * * do you know the name of that song that Harry was just playing * * * The one the orchestra played * * * yes sir. Beg pardon * * * "Chicago" * * * right. [Applause.] Now listen to our Mystery Melody for \$15,100 in prizes.

(Music. * * * Mystery melody.)

PARKS. All right, Mr. Robert Blackburn of New Market, Va. * * * what is your answer? The title of our Mystery Melody * * * do you know, sir? You don't know, Robert? You said tell me somebody * * * I don't know who he's talking
118 to * * * [Laughter.] Anybody tell you? Huh * * * Robert * * * where you been? [Laughter.] Washington & Lee Swing * * * no I'm awfully sorry * * * Bob * * * anyway we're still going to send you that Evans Showcase and a treasure chest of Old Gold cigarettes and thank you for joining

us down there in New Market, Va. * * * Here's June Valli.] [Applause.]

(Music. * * *) [Bell.]

PARKS. Stop the Music! [Applause.] Yes, operator, where to please? Seattle, Washington * * * to speak to whom? Mrs. Flora Eddling. Hello, Mrs. Eddling, how are you tonight, Mrs. Eddling? Well good * * * this is Bert Parks * * * we're going to send you if you can identify that latest record release of June Valli's a beautiful de luxe Westinghouse Refrigerator with its own giant super freezer * * * do you know the title? Beg Pardon? Any idea, Mrs. Eddling? "I'm In Love With A Wonderful Guy" * * * No, I'm sorry Mrs. Eddling * * * Anyway we'll send you a 26 piece set of Kaylan's famous steel cutlery and a treasure chest of Old Gold cigarettes * * * Thank you for joining us in Seattle, Washington. Goodbye. [Applause.] Well, that means we go to our first studio contestant tonight. Young man, your name, sir.

CONTESTANT. Bob Larson.

PARKS. Bob Larson and where's your home, Bob?

119 CONTESTANT. Milwaukee, Wisconsin, Bert. I'm a disc jockey out there and if any of my fans are listening, this is Coffee Head. [Laughter.]

PARKS. Coffee Head * * * they call you Coffee Head?

CONTESTANT. Coffee Head * * * yes, Coffee Head.

PARKS. Well, you sound like you escaped from Dick Tracy there * * * [Laughter.]

PARKS. Bob, what are you doing at Stop the Music this evening?

CONTESTANT. Well, we're vacationing out here in the East, Bert, and I'll tell you I've been hit by so many listeners in the past few weeks with requests for Dick Brown's latest recording of "Whistle My Love" and the new recording that's just about broken madly in Milwaukee called "Strange Sensation" by June Valli, I had to come up and see what these people look like in person.

PARKS. Well, wonderful and what did you did today, Coffee Head? [Laughter.]

CONTESTANT. Bert, first thing I did this morning * * * I think we got up about seven * * *

PARKS. Oh, you overslept a little bit * * * [Laughter.]

CONTESTANT. Yeah * * *

PARKS. But you're having fun and it's a great pleasure to welcome you here. Bob, do you know the name of that song? I bet you do.

CONTESTANT. So Madly In Love * * *

120 PARKS. So Madly In Love * * * you're right. [Applause.] Ok, on with Stop the Music.

(Music. * * *) [Applause.]

PARKS. Well, that's a bit from Il Trovatore and it's known as the Anvil Chorus * * * No matter what's the size of the coin, this next one is like money in the bank * * * and show them what we mean, Dick boy.

(Music. * * *) [Applause.]

PARKS. That of course was "Pennies From Heaven" * * * now stay with us while Stop the Music pauses briefly for station identification * * *

(Music. * * *)

ANNCR. The next quarter hour of Stop the Music is brought to you by the makers of Kix * * * tasty crispy corn puffs * * * food for action and the makers of Dentyne the gum with breath taking flavor * * * and Beeman's Pepsin * * * the gum that's great to chew and good for your digestion too.

(Music. * * *) [Bell.]

PARKS. Stop the Music * * * [Applause.] Yes, sir, where to now operator * * * we're calling Milwaukee, Wisconsin * * * all right and speak to whom? * * * Mr. Earl Forbore * * * Hello, Mr. Forbore * * * how are you sir? By the way, do you know Coffee Head's here * * * [Laughter.] You know 121 Coffee Head, Earl? Said you heard him on the radio * * * well that's always good * * * Bob Larson's here * * * Now, we'd like to ask you for a beautiful Sterling Silver Service for 6 from Westmorland Silverware in their famous George & Martha pattern, what is the name of that tune we just interrupted? "The Carioca" * * * Harry, I knew you didn't play it right * * * I told you * * * [Laughter.] Let me look at the music * * * I don't think that's right * * * but anyway, Mr. Forbore, we're going to send you an easy running 18 inch Excello power lawn mower and I want to thank you very much for joining us out there in Milwaukee, Wisconsin * * * Bye. [Applause.] Well, that means we go to another studio contestant * * * and we have a lovely lady this time * * * Your name, please.

CONTESTANT. Mrs. Jewel Landou * * *

PARKS. Mrs. Jewel Landou and what do you do, Mrs. Landou * * *

CONT. I'm just a housewife * * *

PARKS. Just a housewife * * * well, I wouldn't say that * * * a little night off tonight.

CONT. Yes * * * my husband * * *

PARKS. Where's your husband?

CONT. My husband's home baby sitting * * *

PARKS. Oh, I see * * *

CONT. When I'm off, he's on * * * [Laughter.]

PARKS. When you're off * * * he's on * * * that sounds like an electric switch * * * to me * * * Let's see if you can
122 make contact now and tell us the name of that selection we just interrupted * * *

CONT. The "Kiss of Fire" * * *

PARKS. The "Kiss of Fire" is right * * * [Applause.]

PARKS. Now here is the man who sings the blues because he doesn't take time out to eat breakfast * * *

[Commercial.] [Kix singing commercial.]

ANNCR. People who are always weary always dreary are Nixies * * * So different from active cheery Kixies * * * Kixies are men of action who eat Kix * * * food for action. Lively boys, girls and grownups * * * who always eat breakfast built around a bowl of Kix. How fine everyone feels because Kix is an 83% energy food. Are Kix good? You bet! Crispy corn puffs so tender and tasty. Eat Kix * * * food for action.

[Kix singing commercial.]

PARKS. All right, now here are June Valli and Dick Brown with a few musical ideas of their own.

(Music. * * *) [Applause.]

PARKS. "Thanks For the Memory" OK here's one heard dozens of times * * * listen carefully and tell me what's the name of this one?

(Music. * * *) [Bell.]

PARKS. Stop the music. [Applause.] Yes, operator,
123 where to now please * * * We're calling Utica, New York * * * to speak to? Miss Barbara Barkett * * * All right * * * hello, Barbara * * * hello how are you? Good * * * may I ask how old you are Barbara? 17 years old * * * well, Barbara, what were you doing beside listening to Stop the Music when we called just now? Sitting on the sofa with your boy friend * * * [Laughter.] I'll make it very fast * * * Barbara, we're calling on Stop the Music and we have two beautiful wrist watches * * * one a man's and lady's * * * both styled by the Benrus Watch Co. * * * what's the name of that song? "The Third Man Theme" that's right * * * [Applause.] Which means, Barbara, if you know the title of our Mystery Melody prizes worth more than \$15,100 belong to you and here it is.

(Music. * * * Mystery melody)

PARKS. Alright there you are * * * Barbara Barkett * * * and what is your answer? You don't know that * * * all right, honey it was a pleasure to talk to you and we're going to send you along the Benrus wrist watches and give my best to the boy friend * * * Thanks very much * * * Goodnight. [Applause.]

PARKS. Now, before we continue with Stop the Music here's a message that will be of interest to all of you.

(Chiclets commercial.)

124 PARKS. You know everybody has a favorite town, right * * * Well I'd like to tell you about a town that seems to be everybody's favorite. * * * Harry, the introduction if you will please.

(Music. * * *) [Applause.]

PARKS. Yes, sir * * * "Pittsburgh, Pennsylvania" * * * now we're going to try a touch of the light classics. * * * So, Harry, lightly please.

(Music. * * *) [Applause.]

PARKS. Now a romantic ballad as lovely as the girl that sings it. * * * Here's June Valli.

(Music. * * *) [Bell.]

PARKS. Stop the music. [Applause.] Yes, operator, where is our call to now please? Out to St. Louis, Missouri, and to speak to whom? Mrs. Lola Ryan * * * Hello, Mrs. Ryan * * * how are you? Well, isn't this quite a surprise. * * * Mrs. Ryan. Too much. Well, who's at home listening with you Mrs. Ryan. Part of your family, I see. Well, Mrs. Ryan, this is Bert Parks on Stop the Music and we have a beautiful super 60 Tappan Gas Range with chrome lined oven and a lift off oven door * * * do you know the name of the song June was just singing?

125 Ma'am * * * you didn't listen to it! * * * [Laughter.] Well you want to hear a little more? * * * come on up here June * * * would you sing a little more for Mrs. Ryan out there in St. Louis, Missouri * * * you listening now, closely?

[Music. * * *]

PARKS. Very nice, June * * * all right, Mrs. Ryan out there, what is your answer? You don't know * * * well, anyway we're going to send along to you a set of refreshing Kings Men Toiletries fired in 23 carat gold * * * for Mr. Ryan and thank you for joining us in St. Louis, Missouri. [Applause.]

PARKS. Well, here's a gentleman from our studio audience. May I have your name, sir?

CONT. Solomon Joseph Topping.

PARKS. Mr. Topping and what do you do?

CONT. Main Superintendent of United States Lines Company.

PARKS. U. S. Lines Co.

CONT. Yes.

PARKS. Oh, I see * * * that's the new ship the United States that's new * * *

CONT. Just been launched. First lady of the American Merchant Marine.

PARKS. That's the one we've been reading so much about isn't it * * * Captain.

CONT. That's right, sir. She's due here tomorrow.

PARKS. Yeah.

CONT. And due to sail on her maiden voyage July 1 to Southampton and Havre. You know I'm sure there's one question uppermost in most of our minds * * * between us, how fast will the United States go?

126 CONT. Well, sir, she's about 990 feet long.

PARKS. About 990 feet long. Well, that's very interesting. Well, what I wanted to find out from you was just really what would be the top speed of this new ship the United States?

CONT. Well, sir, she has 12 decks. [Laughter.]

PARKS. Believe me that too was some information I was looking for, Captain. But to get back to the point * * * how fast will it go?

CONT. Well, sir, she could be turned overnight in case of emergency into a troop ship.

PARKS. I see * * * [Laughter.]

PARKS. Well, how are you Captain, you all right?

CONT. Yes, sir.

PARKS. Can you tell me the name of that song we just interrupted?

CONT. "You'll Never Walk Alone."

PARKS. "You'll Never Walk Alone" * * * thank you very much and yes, sir * * * [Applause.]

ANNCR. The past quarter hour of Stop the Music has been brought to you by the makers of Kix * * * tasty crisp corn puffs * * * food for action * * * and the makers of Dentyne * * * the gum with breath taking flavor * * * and Beeman's Pepsin * * * the gum that's great to chew and good for your digestion too.

(Music. * * *) [Applause.]

127 PARKS. That was "Be Anything, But Be Mine" and before we continue playing the best game in radio—Stop the Music—we want you to pay particular attention to the following message.

ANNCR. Audience, who continues with the next portion of Stop the Music.

AUD. Old Gold.

ANNCR. Fine, Old Gold * * * the cigarette that gives you a treat instead of a treatment. Yes, Old Gold, the cigarette that treats you better in every way because in every way it's a better cigarette * * * smooth, mild, tasty * * * Remember no other cigarette in America can match the nearly 200 years experience behind Old Golds * * * and that's why no other cigarette in America can match the taste, the mild all around wonderful smoking pleasure of this fine and great cigarette. Smoke a pack

of Old Golds today and then see if we're not right when we say "for a treat instead of a treatment, have an Old Gold cigarette."

PARKS. Yessirree, and buy your Old Golds by the carton * * * yes by the carton or by the pack * * * Old Gold gives you a treat instead of a treatment.

PARKS. OK, June Valli and I have a song that's a real nice song. It's got something * * * describes something that could happen to you and here we go.

(Music. * * *) [Bell.]

PARKS. Stop the music. [Applause.]

128 Yes, operator, where to now please? Out to Detroit, Michigan, and to speak to whom? Mr. Richard Gilder * * * how are you tonight * * * hello * * * how are you, Dick, everything all right? Pardon. You said just a moment. Hello, Dick * * * yes * * * Dick Gilder, how are you? Well, who was that just talking on the phone just now * * * Oh that was your son and he wants you to be there to answer the question. Well, that's fine, Dick. All right, now this is Bert Parks calling on Stop the Music for Old Gold Cigarettes and we have, Mr. Gilder, from the Keystone Mfg. Co. a wonderful 8mm Olympic roll film movie camera and 500 watt precision projector for brilliant clear pictures * * * do you know the name of that song June and I were just singing? "I Wonder Why * * * no, that's not the title * * * now try it again. Maybe your son can help you, Richard. Do you know? Any idea? He said just a moment * * * all right. [Hums.] Hello Richard * * * any word yet * * * [Laughter.] Anything from the front? [Laughter.] Can't do it, huh, Richard * * * well anyway we're going to send you three wonderful Dormyer appliances—a food mixer, toast maker and fry well and a treasure chest of Old Gold cigarettes * * * and thank you for joining us * * * Sorry you missed it. Goodnight. [Applause.]

129 PARKS. Well, we go to another studio contestant * * * And may I have your name, young lady.

CONT. Florence Messinger.

PARKS. Miss Florence Messinger * * * I see and where do you live Florence?

CONT. In Garden City, Long Island.

PARKS. Garden City and what do you do?

CONT. I'm a student at Adelphi College.

PARKS. At Adelphi College.

CONT. Yes.

PARKS. And what are you majoring in there?

CONT. Home Economics * * * that's food testing and dietetics and things like that.

PARKS. You mean they're teaching you how to cook in college?

CONT. Yes.

PARKS. Well, that's wonderful. What's your favorite dish?

CONT. Chicken Fricassee * * *

PARKS. Oh I love Chicken Fricassee * * * wow * * * I wonder if you'd mind helping us out * * * what is your recipe for Chicken Fricassee?

CONT. Oh I open a can of Swansons' * * *

PARKS. Open a can I see * * * [Laughter.]

PARKS. You're probably getting BA in the Cans * * * Now tell me Florence, can you tell me the name of that song?

CONT. "You're Just In Love"

PARKS. "You're Just In Love" is right * * * and also a treasure chest of Old Gold cigarettes thank you * * *

130 [Applause.]

(Music. * * *) [Bell.]

PARKS. Stop the music. Oh the calls are coming thick and fast * * * where to now operator? Out to Las Vegas, Nevada * * * all right, to speak to? Mr. Kenneth Thaxton. Hello, Ken * * * well I'm fine and what are you doing out there in Las Vegas, Ken. With the Greyhound Bus Co. Well, Ken this is Bert Parks and we're calling for Old Gold cigarettes and we hope you can tell us for a beautiful Westinghouse Clothes Dryer that leaves your clothes line for the birds * * * the name of that tune. Ken, you don't know that one? Oh I'm awfully sorry but anyway for Mrs. Thaxton * * * you're married aren't you * * * we're going to send her a beautiful Kloret handbag to keep her fashionable for years to come and a treasure chest of Old Gold cigarettes * * * thank you and give our best regards out there in Las Vegas * * * [Applause.]

PARKS. Well, give another studio contestant a chance. Your name please.

CONT. Dan Bloom.

PARKS. Dan Bloom, and what do you do, Mr. Bloom?

CONT. I'm an accountant.

PARKS. An accountant. Are you in business for yourself?

CONT. No, sir, I work for an electronics plant in East Newark.

PARKS. I'm sorry I can't hear you.

131 CONT. I work for an electronics plant in East Newark, N. J.

PARKS. That's it * * * young lady would you hold it up close * * * that's fine * * * so we can all hear it on the radio. * * * Say, have you made plans for your vacation yet, Mr. Bloom?

CONT. Well, yes and no.

PARKS. What do you mean yes and no?

CONT. I've made a few and so has my wife. [Laughter.]

PARKS. Well, now tell me what do you want to do?

CONT. I'd like to get off somewhere for a couple of weeks and go fishing.

PARKS. Well, wait a minute, you say you're a fisherman * * * what is the largest fish you ever caught?

CONT. Well I caught one a tuna, 275 lbs. * * * and hooked and threw a 700 lb. and it got away.

PARKS. You're a fisherman all right * * * yes, sir. [Laughter.]

PARKS. Now, Mr. Bloom, can you tell me the name of that song. * * *

CONT. "Blacksmith Blues."

PARKS. The "Blacksmith Blues" is right. * * * [Applause.]

PARKS. Now we'll continue with Stop the Music after this important message.

ANNCR. Smoothness, mildness, wonderful taste * * * friends you find them in Old Gold cigarettes. When you light up an Old Gold you enjoy a blend of the world's best tobaccos superbly blended by America's foremost tobacco craftsmen. And
132 remember this, when I ask you to smoke Old Golds I don't like to worry you with medical claims about irritation in nose and throat, why should I. I'm selling you a treat not a treatment. But still and all you might like to know that no other leading cigarette is less irritating, or easier on the throat or contains less nicotine than Old Golds cigarettes. Who says so? Me or the makers of Old Golds * * * no, that conclusion was established on evidence by the United States Government. So enjoy your Old Golds * * * enjoy all that smoothness, that mildness that delightful taste, ready and waiting for you in every golden pack of Old Golds * * * yes, that's our story * * * a marvelous smoke, a treat instead of a treatment * * * Old Golds Cigarettes * * * The next time you need cigarettes * * * make it Old Golds. * * *

(Music. * * *) [Applause.]

PARKS. That was the "Karrie Dancers". Now a salute to the gallant corps of land and sea. Stand back for the fighting Leathernecks * * *

(Music. * * *) [Bell.]

PARKS. Stop the music. Yes, the Marine Hymn and stop the music * * * hold everything * * * we want to tell you about the rest of our jackpot * * * you've already heard about your two week vacation in Miami Beach, a thousand dollars from Sweet-heart Soap, Amelia Earhart luggage, a thousand dollars
133 from Peter-Paul Zero Frozen Custard Dessert, four Schwim bicycles and \$500 from Bonny Belle * * * Your fishing equipment from Wright & McGill and Judy the scarlet Macaw

from Tropical Hobby Land. And now * * * let's listen to part two of our giant jackpot. * * *

[Music. * * *]

ANNCR. You'll come home to a beautiful new Futorian living room suite, including a highly styled modern Bellaire Sofa plus a full size lounge chair and ottoman in your choice of fabrics and colors * * * and all pieces designed for distinctive living by the Futorian Mfg. Co. of Chicago.

[Music. * * *]

ANNCR. A Storey & Clark piano * * * instrument of musical perfection * * * with the exclusive Storey mahogany sounding board in a style appropriate for your home. A treasured prize from the Storey & Clark Piano Co. of Chicago.

[Music. * * *]

ANNCR. A beautiful 12 x 15 Grover classic leaf design carpet from the looms of Mohawk * * * a newly styled Mohawk carpet to lend distinction to your room.

[Music. * * *]

ANNCR. For your dining room a mahogany 18th century junior dining room suite by Craddock including a beautiful dining table to seat 12 and many occasional pieces all luxurious designed by the Craddock Furniture Corp.

[Music. * * *]

ANNCR. And you'll be cool all summer long with a wonderful Snow Breeze residential modern air cooler and window adapter from the Farmer Mfg. Co. Yes, you will enjoy that snow cool comfort in your home with your Snow Breeze air cooler.

[Music. * * *]

ANNCR. From the Westmoreland Silver Co. a solid sterling silver service for 12 in Westmoreland's famous George and Martha pattern in a mahogany tarnish proof chest * * * a set further enhanced with the beautiful Westmoreland carving set candle-labra and 4 piece coffee service.

[Music. * * *]

ANNCR. Three beautiful Westinghouse appliances * * * first the famous Westinghouse laundromat, the automatic washing machine plus the gleaming clothes dryer that leaves your clothes line for the birds * * * and in addition a beautiful modern Westinghouse refrigerator to glamorize your kitchen.

[Music. * * *]

ANNCR. On your trip you'll wear a stunning Benrus wrist watch with a glittering diamond studded bracelet * * * personally styled by Benrus with the famous 17-jeweled accurated movement * * * a prize from the Benrus Wrist Watch Co. valued by them at \$2,000.

[Music. * * *]

ANNCR. And a lovely diamond clasped strand of iridescent oyster grown Deltah cultured pearls all perfectly matched and hand mounted by pearl experts and valued at \$1,000 by the celebrated House of Heller.

[Music. * * *]

ANNCR. A perfect gift for your trip to Florida * * * a
135 wonderful ensemble of six Koret handbags, including a lovely summer white all original designs, beautifully fashioned by Koret to keep you in style for many years to come. And to compliment your ensemble.

[Music. * * *]

ANNCR. And a wonderful wardrobe of 12 lovely Yolande blouses * * * plus a glamorous trousseau of Yolande lingerie * * * all pieces beautifully fashioned with exquisite imported embroidery by Yolande of N. Y.

[Music. * * *]

ANNCR. And to top it all off * * * \$1,000 in cash to redecorate your kitchen from Beacon Wax * * * the scrub resistant, nonrubbing floor wax that keeps your floors shining clean. A wonderful prize from Beacon Wax.

[Music. * * *]

ANNCR. And there's the jackpot, Bert Parks.

PARKS. Ah, but Don, let's add to that jackpot right now.

ANNCR. All right, Bert. For dad a wardrobe of famous Top-O-Mart Clothes * * * including 2 cool tropical worsted suits to wear in Florida plus sport coats and Top-O-Mart year 'round suits * * * all with Top-O-Mart exclusive full fashion styling to keep you comfortable and well dressed at all times.

PARKS. Yes, there it is * * * our giant jackpot * * * now valued at more than \$15,700 and in a moment we'll play our mystery melody again * * * and always remember on Stop the Music that jackpot will grow * * *

136 AUD. And grow and grow and grow * * *

(Music. * * * Mystery melody.)

PARKS. Yes, the first man, woman or child to answer our call and identify that mystery melody will win every single prize in our giant jackpot * * * Plan to be with us next Sunday night, same time, same station for Stop the Music * * * with Harry Salter and the orchestra, Dick Brown, June Valli and yours truly, Bert Parks. Friends, good luck and good night and I'll be calling you.

(Music. * * *)

ANNCR. Stop the music is a production of Louis G. Cowan and in association with Mark Goodson, under the supervision of Alfred Hollander and directed by Bob Reed. [Applause.]

ANNCR. Before saying so long, I, Don Hancock, would like to introduce Old Golds new and upcoming brother, Embassy Cigarettes. Embassy, the distinctively fine and distinctively milder, king size cigarette. Some folks prefer the regular size cigarette others go for the long cigarettes, but the folks who make Old Golds are broadminded, they feel that if some folks like to travel the longie route they ought to travel first class. So if you're now smoking king size cigarettes, may I suggest a change to Embassy * * * the distinctively milder, king size, cigarette.

ANNCR. Stay tuned now for Drew Pearson with Predictions of Things to Come, immediately followed on most of these 137 stations by the gay comedy Meet Corliss Archer. Stay tuned.

ANNCR. This program came to you from New York.

This is ABC * * * the American Broadcasting Company.

138

STOP THE MUSIC—TV

April 17, 1952

LOUISE. Hello, I'm Anita Louise and this is my daughter Melanie. We're exchanging compliments about our hair. Last night we washed our hair with White Rain Lotion Shampoo.

MELANIE. Wasn't it fun, mommy.

LOUISE. Loads of fun, darling. White Rain makes such wonderful rainfall suds. Extra gentle to give loveliest rainwater results. White Rain is not a cream, not a dulling soap, not a drying liquid, but a wonderful new lotion shampoo. Gentle as rainwater.

MELANIE. Your hair looks pretty, mommy.

LOUISE. With White Rain your hair is never dull or dry, but naturally soft and silky, bright as sunshine. Use White Rain tonight and tomorrow your hair will be sunshine bright.

(White Rain jingle.)

(Music. * * *)

ANNCR. It's Stop the Music and here's your master of musical ceremonies—Bert Parks.

(Music. * * *) [Applause.]

PARKS. Thank you very much ladies and gentlemen and in case some of you don't know how Stop the Music is played, here's Betty Ann Grove to give you an idea. Right here, Betty.

(Music. * * * Grove * * *). [Bell.]

PARKS. Stop the music. All right, audience, all together, what was the name of that song?

139 AUD. Music Music Music.

PARKS. That's right, "Slow Poke" [Laughter.] And that's the way we play Stop the Music with Betty Ann Grove,

June Valli, Jack Haskel and Harry Salter and his orchestra. So stay right where you are friends as our telephone operators place calls throughout the country. You may be the winner of a Moore-McCormack cruise, a new Willys sedan and \$10,000 in cash. The first half hour of Stop the Music is brought to you by Prom, the exciting new home permanent that needs no neutralizer. Say, how long is it going to take for that camera to get set.

(Music. * * *) (Prom musical commercial.)

PARKS. Yes, sir; you know they say that one of the best ways to avoid getting dizzy in high places is to keep your eyes straight out and look * * *

(Music. * * *)

PARKS. Stop the music * * * [Applause]

PARKS. Oh what a beautiful morning * * * oh what a beautiful * * * hello, operator * * * where to please? We're calling Detroit, Michigan, to speak to * * * Mrs. Shirley Moth * * * Hello, Shirley. How are you? Is that you right there? You look wonderful Shirley. How's your family? Everybody all right? Well, good. This is Bert Parks calling from Prom Home Permanent, and now for a roomy Westinghouse Automatic Electric Dishwasher that's safe for all your dishes and glass-
140 ware * * * what's the name of that song? Beg pardon!

"You Beautiful Doll" * * * That's right. Good for you. [Applause.] All right, Mrs. Moth out there in Detroit, Michigan, we're going to play for you our Mystery Melody and remember your first answer counts, along with it goes \$10,000 in cash, that Moore-McCormack cruise. Are you ready? Here it is.

(Music. * * * Mystery Melody.)

PARKS. All right, there you are. Mrs. Shirley Moth of Detroit, Michigan, what is your answer? Repeat that again. Oh, you don't know. Well, I'm awfully sorry. But anyway, Mrs. Moth, we're still going to send along to you that Westinghouse Dishwasher and in addition we're sending you Prom, the new easier home permanent that needs no neutralizer. Thank you. Good luck to you. [Applause.]

PARKS. (Biz.)

(Music. * * *) [Applause.]

ANNCR. That was June Valli and Loch Lommond. And now Bert and Betty Ann meet a long way from home.

(Music. * * * Parks & Grove.) [Bell]

PARKS. Stop the music * * * [Applause.] Hello, operator, where to please? Baltimore, Maryland * * * speak to?
141 Mrs. Blanche Lathrope? Licely * * * Hello, Mrs. Licely
* * * how are you * * * Hope you're having fun with us, Mrs. Licely * * * Did you have a nice Easter? Get a new hat? Complete outfit * * * well that's wonderful. What does Mr.

Licely do? A stevedore. You have children? Two married sons? * * * Well, Mrs. Licely, It's a pleasure to talk to you. This is Bert Parks calling for Prom Home Permanent. We have a beautiful super-6 feet Tappan Gas Range with chrome lined oven and removable oven door if you can tell me the name of the song Betty Ann and I were just singing. "Are You From Dixie?" You're right. That's it. [Applause.] All right, Mrs. Blanche Licely, it's your chance now to identify that Mystery Melody for us for all those wonderful prizes. Listen closely. Here it is.

(Music. * * * Mystery melody.)

PARKS. Mrs. Licely down there in Baltimore, Maryland, do you have any idea of the exact title? "Pack Up Your Troubles" * * * no, that isn't it. Harry said no. That isn't it. Well, anyway, Mrs. Licely, we're still going to send along to you that Tappan Gas Range and of course Prom, the new easier home permanent that needs no neutralizer. Thank you for joining us. [Applause.]

PARKS. Well now here's Jack Haskel, let's see if he can find that lucky number.

(Music. * * *)

142 [Bell.]

PARKS. Stop the music * * * [Applause.] We're going out to Ames, Iowa * * * all right, and who is the party waiting to talk to us out in Ames, please? Miss Lois Drethen. Hello, Miss Drethen. I hope we pronounced your name correctly. Drethen * * * fine * * * and how are you Miss Drethen? And who's watching with you? Beg pardon? Kinda of weak and sitting down * * * well good. You're nice and comfortable, huh. Who's watching with you, Miss Drethen? Your children. How old are they? Elaine is 13 and who * * * Diane * * * Who's that right there? No, he just moved * * * he just moved * * * Tell him to move this way a little * * * that's Diane, isn't it, right there? That's right. You put on a little weight * * * what * * * wonderful * * * had their hair permanented * * * oh wonderful * * * Prom no doubt * * * yes. Well anyway, as you know, Mrs. Drethen, we're calling for Prom Home Permanents * * * we have a new Sew Gem table model sewing machine with Suzy the Miracle Stitcher if you can just tell me the name of the song Jack was just singing. "The Wheel of Fortune" is right. [Applause.] All right, Mrs. Drethen, let's get on to that mystery melody * * * \$10,000 in cash, a Moore-McCormack cruise and a Willys sedan * * * all right Harry Salter, let's hear it.

(Music. * * *) [Mystery melody.]

143 PARKS. All right, Mrs. Drethen, what is your answer please? You say that the title of the mystery melody is "We All Have Troubles of Our Own" * * * It sounds familiar but that's not the one I have here, Mrs. Drethen * * * Anyway we're still going to send along to you of course, that Sew Gem Table Model Sewing Machine and Prom, the new easier home permanent that needs no neutralizer * * * Thank you and good luck to you. Bye. [Applause.]
(Music. * * *)

(FROM SINGING COMMERCIAL)

BARRIE. I want to show you my favorite permanent wave * * * now come a little closer * * * See this. I had a Prom and it was so easy because Prom needs no neutralizer * * * This one wonderful Prom lotion is all you use * * * Now you apply this as you roll your hair up in curlers in the ordinary way and thirty minutes later you just rinse with plain water and that's all the work you do. Now, see, your wave neutralizes automatically as your hair dries naturally on the curlers. No messy old neutralizer to bother with, just this one wonderful Prom lotion. Oh, here's the best news ever. Now you know that Prom's automatic neutralizing gives your hair a much prettier wave, lasts much longer than any other home permanent. Now, do you know why? I'll tell you. With ordinary home permanents, you know, you have to dab the neutralizer on the outside of the curl like this and sometimes
144 that neutralizer fails to penetrate down to the inside of the curl. So if this happens you're liable to get little or no wave at all, or a scraggly little old end like that. 'Course this cannot happen with a Prom because Prom neutralizes automatically and completely the entire curl. This way you get a fine, long-lasting wave all through your hair and springy end curls like that. See the difference? Do you know that there's never been a permanent like Prom? Let me just show you. Let me just show you how springy these end curls really are. See that? Uh hugh. Now you know even if every other wave has failed, Prom is guaranteed to take beautifully every time and it's so much easier because it needs no neutralizer * * * and it leaves your hair with a lovelier, longer-lasting wave because Prom neutralizes automatically. So get yourself a Prom home permanent. You'll look prettier with a Prom. [Applause.]

PARKS. Thank you very much, Wendy, and you know folks down in the hill country they judge a man by the size of his feet * * * just look at right here * * *

(Music. * * *) [Applause.]

PARKS. That was Ralph McWilliams and Stretch Barton. And now, a moon, a tune and our own June.

(Music. * * *) [Applause.]

ANNCR. If you know your flowers and your weather conditions * * * you'll recognize "Orchids In the Moonlight"
 145 * * * And now let's watch and listen while Bert Parks brings home an uninvited guest.

(Music. * * *).

PARKS. (Biz.) [Bell.]

PARKS. Stop the Music. [Applause.]

PARKS. Hello operator, where to, please? San Francisco, California. All right, and who are we going to speak to out there? Mrs. Marion Berman. Hello, Mrs. Berman. Fine. How's the weather out there. It's beautiful * * * well you know it's been lovely in New York today too. Did you have a nice Easter? Well good. This is Bert Parks calling for Prom home permanent. We have a wonderful 35mm Argus Camera with its companion blower cooled slide projector if you can tell me the name of that song. "Be My Life's Companion" is what it is. Right you are. [Applause.]

PARKS. Now, Mrs. Berman, we're going to play for you our Mystery Melody and remember your first answer counts, because on that right answer rides \$10,000 in cash, a Moore-McCormack cruise and a brand new Willys sedan * * * are you ready * * * OK, Harry Salter.

(Music. * * * Mystery Melody.)

PARKS. There you are, Mrs. Berman * * * what is your answer? You say it's "Down By The Station" * * * No, I'm
 146 awfully sorry * * * it probably does sound something like it * * * anyway we're going to send you that Argus camera and projector and of course Prom the new easier home permanent that needs no neutralizer. Thank you and good luck. [Applause.]

PARKS. And now Betty Ann Grove offers vocal proof that bananas should never be kept in the refrigerator.

(Music. * * *)

ANNCR. That was Betty Ann singing Banana Nica * * * no I mean Managua Nicaragua * * * And see if you can analyze this tune sung by June Valli and Jack Haskel with an assist by Dr. Murray Slam.

(Music. * * *) [Applause.]

PARKS. I'll Buy That Dream * * * Now here's a song coming up * * * let's see if you know the title of this one as sung by Betty Ann Grove * * * Right here.

(Music. * * *) [Applause.]

PARKS. That was undoubtedly called "Boo Hoo." All right, let's test your wits on this one sung by Jack Haskel * * * Here we go.

(Music. * * *) [Applause.]

PARKS. Yessir. If you said "I Want A Girl Just Like The Girl That Married Dear Old Dad," you're exactly right * * * You know, friends, the first half hour of Stop the Music is brought to you by Prom the new far easier home permanent that needs no neutralizer * * *

GIRL. And here's some more wonderful news for you.
147 Prom and only Prom comes in three different types for three different types hair. After all, some women have very easy to wave hair so they need Prom's Very Gentle. Some have hard to wave hair and they need Prom's Super * * * and other's have normal to wave hair so they need Prom Regular. Get yourself Prom, the new home permanent that needs no neutralizer and has that just right lotion for your type of hair. And you'll look prettier with a Prom.

PARKS. Yessir. Well stand by friends for the next half hour * * * Will someone crack that mystery melody and win all those prizes * * * well don't go away * * * because it can happen * * * in just 30 seconds when we continue with the calls for the second half of Stop the Music.

(Music. * * *)

ANNCR. This is the American Broadcasting Company.

(Music. * * *)

PARKS. Welcome to Stop the Music folks and this is Bert Parks. We hope you'll play along with us and I mean of course Betty Ann Grove, June Valli, Jack Haskel, Harry Salter and his orchestra * * * During the next half hour someone may identify that mystery melody and win that Moore-McCormack cruise, a brand new Willys sedan and \$10,000 in cash. It may even be you. Right now here is Mr. Old Gold himself, Dennis James. [Applause.]

JAMES. Thank you Bert, very much. Thank you. Ladies and gentlemen, I'd like to introduce at this time my two favorite
148 girl friends, the Old Gold dancing cigarette pack and the little book of matches dancing to * * * can't tell you the name of the song * * * Tico Tico * * * here they are.

(Music * * *.)

JAMES. Well here it is * * * Old Gold * * * smoother, tastier, milder Old Gold * * * the cigarette that gives you a treat instead of a treatment. Yes, Old Gold the cigarette that treats you better in every way because in every way it is a better cigarette * * * It's smooth and mild and tastier * * * Old Gold cigarettes * * * the treasure of them all. [Applause.]

PARKS. Yessir * * * in the game today the Dodgers defeated the Giants 4-0, which reminds us that the baseball season is here so we'd like to have you meet our lead-off batter * * * Betty Ann Grove * * * right here * * *

(Music * * * .) [Applause.]

PARKS. Oh sluggerooo, singing "Take Me Out To The Ball Game" * * * You may not recognize these feet of Jack Haskel but the situation and the tune should be very familiar.

(Music * * * .) [Applause.]

PARKS. Well, that boy's no slow poke * * * Say, you know, everybody sings on Stop The Music except you folks. Well, we're going to give you an opportunity to do that. As you know, one of the important things about Stop the Music is that you can never sing the title because by so doing you tip off the con-
149 testant. Here's what we're going to do. We have some cards here * * * we're going to sing a one-word title song and every time we come to that one word I'll point to one of those cards and you folks in the audience sing along with me. And you folks at home, would you like to join us? Come on Harry, let's do it.

(Music * * * .) [Bell.]

PARKS. Stop the Music. [Applause.]

PARKS. Wasn't that fun * * * Hello operator * * * where to? Huntington, West Virginia * * * All right and speak to? * * * Mrs. Marguerite Downey * * * Hello, Mrs. Downey * * * hello * * * Hello, Mrs. Downey * * * hello * * * operator * * * can't hear Mrs. Downey * * * is she there * * * Hello, Mrs. Downey * * * oh there you are * * * well, good * * * how do you feel, Mrs. Downey? good * * * hope you're enjoying yourself * * * Good. This is Bert Parks calling for Old Gold cigarettes * * * we have a modern Fashion Trend 5 piece bedroom suite beautifully designed in lime oak by Johnson Carper if you can tell me the name of the song that the audience and I were just singing * * * Ma'am * * * "Anytime" is right. * * * [Applause.] Now, Mrs. Downey * * * here's your chance to identify that mystery melody for all those wonderful prizes * * * listen closely * * * here it is * * *

(Music * * * Mystery Melody.)

PARKS. Now, Mrs. Marguerite Downey of Huntington,
150 West Virginia * * * what is your answer please? You don't know that * * * well, anyway we're still going to send along to you that Johnson Carper bedroom suite and for you a treasure chest of mild, mellow Old Gold cigarettes * * * A chest filled with pleasure for your enjoyment * * * thank you very much. Goodbye. [Applause.]

PARKS. (Biz.)

(Music * * * .) [Applause.]

PARKS. (Biz.) Hello, operator * * * where to please? * * * we're going to talk to whom please? Sandra Gall * * * hello, Miss Gall * * * how are you? Well good. Did I ask what you

do * * * do you have an occupation * * * Oh, I see * * * you go to school * * * where do you go to school * * * Oh, high school. I see * * * Well this is Bert Parks, we're calling for Old Gold cigarettes. Sandra, we have a deluxe 1952 Chill Chest by Reppco that fast freezes as far up as 285 lbs of frozen food. What's the name of that song that June Valli just sang. "The Boy Next Door" that's right. [Applause.]

PARKS. And now here's our Mystery Melody * * * Harry.

(Music * * * Mystery Melody.)

PARKS. All right, now if you get this one right remember \$10,000 in cash and a Moore-McCormack cruise, what's the name of that song? * * * Don't you, Sandra? * * * Well, any-
 151 way honey we're going to send along to you that Chillchest by Reppco and of course a treasure chest of mild mellow Old Gold cigarettes * * * a chest filled with pleasure for your enjoyment * * * thank you and good luck. [Applause.]

PARKS. Now, here's your neighbor and mine, Dennis James * * * [Applause.]

JAMES. Thank you, Bert, very much * * * thank you. You know I'm lucky to have this neighborly fence here at all because it's a wonder Louis throwing the ball didn't knock it down * * * That's a kid that can hit everything but the window * * * Speaking of these fences * * * an awful lot of talk is over neighborly fence whether it's a backyard fence or a frontyard fence and sometimes it's very gossipy talk about "did you hear that Louis is pitching for the bloomer girls?" "or Judy Holliday's picture The Marrying Kind I saw last night and John and I liked it"

* * * or maybe it's advice on how to bake a cake or something * * * But I tell you, since we have the fence, I could kind of chat to you as a neighbor and talk to you about what I consider the very finest cigarette * * * I've talked to you many, many months now and many years about Old Gold cigarettes and I'd like to just lean over the fence and say honestly and sincerely "try an Old Gold" * * * Try it because in an Old Gold cigarette you'll find the world's best tobacco * * * you'll find those tobaccos blended by the world's greatest tobacco craftsmen * * *

152 tobaccos blended by the world's greatest tobacco craftsmen * * * Here's a cigarette that gives you a treat instead of a treatment. The cigarette that treats you better in every way because in every way it is a better cigarette. Remember this too, it's the cigarette about which it has been said "No other leading cigarette is less irritating, easier on the throat or contains less nicotine than Old Gold Cigarettes." Now who said this? Me?

No * * * the makers of Old Gold cigarettes? No sirree * * * this conclusion was established on evidence by the United States Government. Yet what is it we talk about? We talk about pleasure * * * that's right * * * Deep down smoking pleasure * * * Try an Old Gold yourself * * * Find out if it isn't a really fine cigarette and if it isn't everything we say it is * * * Old Gold cigarettes * * * you'll love them. So long * * * we'll talk to you soon. Bye bye. [Applause.]

PARKS. Now here's Don Pippin and an old piano * * * a new tune, see if you know it.

(Music. * * *) [Applause.]

ANNCR. Well, did you recognize that one? Don Pippin doing some fancy piano moving with "Noodlin' Rag" * * * And now we're sure that you'll recognize this next one. It's a surprise for Bert from Betty * * *

(Music. * * *)

PARKS. Stop the Music. [Applause.]

PARKS. Yes, sir * * * hello, operator * * * where to
153 please? Schenectady, New York, to speak to? Frank Hutton. How are you Frank? Well, I'm very well tonight, sir * * * and as you know, we're calling for Old Gold cigarettes * * * We have a beautiful 5 piece set of world famous Amelia Earhart luggage you'll carry with pride wherever you travel * * * what's the name of that song? "People Will Say We're In Love" * * * that's right * * * [Applause.]

PARKS. Now we're going to play for you our Mystery Melody and remember your first answer counts * * * \$10,000 in cash rides on this * * * Ok, Harry Salter, let's hear it.

(Music * * * Mystery Melody.)

PARKS. There you are, Mr. Frank Hutton of Schenectady, New York * * * what is your answer? You don't know that one * * * well, anyway, you've identified the first song correctly and so we're going to send along to you that set of Amelia Earhart luggage and, of course, a treasure chest of mellow, mild Old Gold cigarettes * * * a chest filled with pleasure for your enjoyment * * * thank you very much, sir, and good luck to you. Bye. [Applause.]

PARKS. And now here's Jack Haskel and our pony ballet * * *

(Music * * *) [Applause.]

PARKS. And that was "Blacksmith Blues" sung by Jack Haskel * * * the blacksmith was Fred Thornton, the horse's head
154 was Ralph McWilliams and Jimmie Nigron also participated * * * Now * * * [Laughter.] All right * * * all right * * * Now here's a message of importance for all cigarette smokers * * *

ANNCR. Here's something you should know. The National Tobacco Tax Research Council says you give nearly two million dollars a year to your government in cigarette taxes * * * every-time you buy cigarettes * * * you give your federal government 8¢ a pack * * * and most of you give three or four cents more to city and state governments * * * That adds up to better than a 50% tax which is really paying up to the hilt. Yes, in buying cigarettes over half your pack goes for tax.

PARKS. Betty Ann Grove is really cleaning up these days * * * see if you know the tune.

(Music * * *) [Applause.]

PARKS. That was Betty Ann Grove in "A Good Man is Hard to Find" * * * Now June Valli and Jack Haskell's favorite time is roller skating * * * As a matter of fact, June is a very good skater until she sees Jack * * * June be careful will you * * *

(Music * * *) [Applause.]

That's "Let's Take An Old Fashioned Walk" and now here's Betty Ann Grove as we play Stop The Music * * *

(Music. * * *) [Applause.]

PARKS. Well that was a little song called "Enjoy Yourself" 155 self" and we hope you're enjoying yourself Is June here?

June is not here * * * June couldn't make it * * * what's the name of the song? * * * Do you know the title of the song la da dee * * * Play it, Harry, let's go * * * Ready * * * go!

(Music * * *) [Applause.]

PARKS. Stop the Music * * * [Applause.]

PARKS. Yes, sir; Stop the Music * * * we're still looking for the first man, woman or child in the USA to give us the name of that television Mystery Melody * * * and now your attention, America * * * get set for the melody that's still a mystery * * * the tune that's haunting the country * * * our television Mystery Melody. Here it is.

(Music * * * Mystery Melody.)

PARKS. Yes, sir, that's the song all America is talking about * * * the television Mystery Melody that can win you every prize in that giant jackpot * * * which starts off with \$10,000 in cash and in addition a fabulous South American cruise aboard a Moore-McCormack luxury liner for 38 glamor filled days of swimming, deck sports and all the other cruise pleasure * * * your Moore-McCormack liner affords. Including many festive evenings as you travel from New York to glamorous Rio de Janerio and Buenos Aires * * *

ANNCR. And a beautiful 1952 Arrow Willys sedan fashionably designed for extra room and wide visibility and with Willys hurricane engine for smooth comfortable riding on any road.

156 ANNCR. And there's the jackpot, Bert Parks.

PARKS. Yes, there it is * * * the giant jackpot ready and waiting for the first person in our television audience who answers our call next Thursday night and gives us the exact title of that television mystery melody * * * And now, friends before we tell you about next weeks' Stop The Music * * * here's a word from Dennis James.

JAMES. Da da da dee da * * * if you want to think of a really fine cigarette just think of my little friend right over here * * * let's look * * * [Dancing cigarette pack and matches.] Yes, sir; Old Gold cigarettes for a treat instead of a treatment * * * so long talk to you next week * * * [Applause.]

PARKS. Well, plan to be with us friends next Thursday night when once again Old Gold cigarettes brings you Stop the Music—television * * * be sure to tune Old Gold's other television shows * * * The Original Amateur Hour and Down You Go. Consult your newspaper for time and stations * * * and of course be sure to listen on Sunday to our radio Stop the Music and our radio mystery melody * * * And so until we meet again, friends * * * this is Bert Parks saying thank you very much * * * I'll be calling you.

(Music. * * * Parks * * *)

ANNCR. Miss Grove's gowns by Ann Fogerty * * * Miss Barrie's clothes by Ceil Chapman * * * Of course, if you're in any way associated with Stop the Music you are ineligible to win prizes * * * [Applause.]

157 (Muriel cigar commercial.)

(Music. * * *)

ANNCR. The preceding program has come to you by special video recording * * * This is the American Broadcasting Company.

160 In United States District Court

Civil Action No. 52-24

[File endorsement omitted.]

[Title omitted.]

Notice of motion for summary judgment

(Filed September 22, 1952)

Sirs: Please take notice that upon the amended complaint herein, the stipulation between the parties, dated September 16, 1952, the annexed affidavit of G. B. Zorbaugh, verified September 19, 1952, and all the other papers and proceedings heretofore filed and had herein, plaintiff will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as the Court may designate for summary judgment granting the relief demanded in the amended complaint, pursuant to Rule 56 of the Rules of Civil Procedure for the United

States District Courts, on the ground that there is no
161 genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

September 22, 1952.

CRAVATH, SWAINE & MOORE,

By ALFRED McCORMACK,

A Member of the Firm,

Attorneys for Plaintiff,

15 Broad Street, New York 5, N. Y.

To: Attorney General of the United States, Washington, D. C.;
United States attorney for the Southern District of New York,
United States Court House, Foley Square, New York, N. Y.;
Federal Communications Commission, Washington, D. C.

164 In United States District Court

Civil Action No. 52-24

[Title omitted.]

[File indorsement omitted.]

Notice of motion to dismiss, etc.

(Filed September 23, 1952)

Sirs: Please take notice that upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 11th day of August 1952, and upon all the other papers and proceedings heretofore filed and had herein, the undersigned will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as

the Court may designate for an order dismissing the complaint or, in the alternative, directing that summary judgment be entered in favor of the United States of America and the Federal Communications Commission, defendants, on the grounds stated in the attached motions.

Dated: Washington, D. C., Sept. 22, 1952.

William J. Hickey,
WILLIAM J. HICKEY,
Special Assistant to the Attorney General,
Attorney for the United States of America,
 Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,
 Richard A. Solomon,
RICHARD A. SOLOMON,
Assistant General Counsel,
 Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,

Attorneys for the Federal Communications Commission.

NEWELL A. CLAPP,
Acting Assistant Attorney General,
 JAMES E. KILDAY,
Special Assistant to the Attorney General,

MYLES J. LANE,
*United States Attorney for the Southern District of
 New York,*
Attorneys for the United States of America.

165 To: Cravath, Swaine & Moore, Attorneys for Plaintiff,
 15 Broad Street, New York 5, New York.

Copy received Sept. 22, 1952.

Cravath, Swaine & Moore.

166 In United States District Court

Civil Action No. 52-24

[Title omitted.]

[File endorsement omitted.]

*Motions to dismiss the complaint or, in the alternative, for
 summary judgment*

(Filed September 23, 1952)

Upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 11th day of August 1952, and upon all other papers and proceedings heretofore filed and

had herein, the defendants in the above-entitled cause move this Court that the amended complaint be dismissed or, in the alternative, for summary judgment in their favor.

A. The ground of the Motion to Dismiss the complaint is:

Plaintiff fails to state a claim upon which relief can be granted.

B. The ground of the Motion for Summary Judgment is:

The amended complaint, together with the exhibits thereto annexed, the affidavit submitted on this motion, and the other papers and proceedings heretofore filed and had herein, show that there is no genuine issue as to any material fact and that defendants United States of America and the Federal Communications Commission are entitled to a judgment as a matter of law.

Dated: Washington, D. C., September 22, 1952.

William J. Hickey,

WILLIAM J. HICKEY,

Special Assistant to the Attorney General,

Attorney for the United States of America.

Benedict P. Cottone,

BENEDICT P. COTTONE,

General Counsel,

Richard A. Solomon,

RICHARD A. SOLOMON,

Assistant General Counsel,

Daniel R. Ohlbaum,

DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

NEWELL A. CLAPP,

Acting Assistant Attorney General,

167 JAMES E. KILDAY,

Special Assistant to the Attorney General,

MYLES J. LANE,

United States Attorney for the Southern District of New York,

Attorneys for the United States of America.

168

Affidavit of Benedict P. Cottone

DISTRICT OF COLUMBIA,

City of Washington, ss:

Benedict P. Cottone, being duly sworn, deposes and says:

1. He is the General Counsel of the Federal Communications Commission, and makes this affidavit in support of the Motion for Summary Judgment made by the United States of America and the Federal Communications Commission, defendants, and in opposition to the Motion for Summary Judgment made by the plaintiff.

2. He is familiar with the Commission's proceedings with respect to the promulgation of rules governing the broadcast of lottery information, and that the proceedings included the following:

(a) These proceedings concerning the promulgation of rules governing the broadcast of lottery information were instituted by the Commission's Notice of Proposed Rule Making, released August 5, 1948. Proposed rules interpreting Section 316 of the Communications Act of 1934, as amended, 47 U. S. C. Section 326, were appended to that Notice. The Section referred to prohibited the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance."

(b) In the light of the prior removal of Section 316 from the Communications Act of 1934, as amended, and recodification of this section as Section 1304 of the United States Criminal Code, 18 U. S. C. Section 1304, the Commission issued, on August 27, 1948, a Supplemental Notice of Proposed Rule Making.

(c) Pursuant to the above Notices, briefs and comments were filed with the Commission by the Radio Council of National Advertisers, Inc.; Premium Advertising Associates of America, Inc.; Radio Features, Inc.; Louis G. Cowan, Inc.; Maryland Broadcasting Company, Licensee of Station WITH: Columbia 169 Broadcasting System, Inc.; National Broadcasting Company, Inc.; National Association of Broadcasters; Pierson and Ball; Arthur W. Scharfeld; and American Broadcasting Company, Inc., plaintiff in this action.

(d) On October 19, 1948, oral argument was held before the Commission en banc, in which National Association of Broadcasters; Maryland Broadcasting Company; Radio Features, Inc.; Radio Council of National Advertisers; Columbia Broadcasting System, Inc.; National Broadcasting Company, Inc.; W. Theodore Pierson; Arthur W. Scharfeld; Simons Broadcasting Company; Louis G. Cowan, Inc.; and American Broadcasting Company, Inc., plaintiff in this action, participated.

(e) After consideration of the briefs and comments filed, and of the oral arguments, the Commission released, on August 19, 1949, its Report and Order promulgating Sections 3.192, 3.292, and 3.692 of its Rules and Regulations, to enjoin the enforcement of which this action is brought. The Report and Order specified that these rules were to become effective on October 1, 1949. Commissioners Coy, Chairman, Hyde, and Jones did not participate in the adoption of the Report and Order of August 19, 1949, and Commissioner Hennock dissented from its adoption. By its Sixth Report and Order adopted on April 11, 1952 in Dockets No. 8736, et. al., the Commission renumbered Section 3.692 as Section 3.656.

(f) The rules appended to the Report and Order of August 19, 1949 provide that no authorization for the operation of a broadcast station will be granted if the applicant proposes to follow or continue to follow a policy of broadcasting or permitting the broadcasting of any program violative of Section 1304 of the United States Criminal Code. The rules further set forth with specificity certain types of programs which the Commission will in any event consider as falling within the provisions of that statute.

(g) This action and a similar action brought in the District Court for the Northern District of Illinois having been commenced, a temporary restraining order suspending the effectiveness of the rules here in issue with respect to the parties in litigation having been issued by the District Court for the

170 Northern District of Illinois on September 13, 1949, and this Court having decided on September 19, 1949 to issue a similar order, the Commission, on September 21, 1949 issued an order postponing the effective date of said rules until at least thirty days after the ultimate determination of these actions.

3. A certified copy of the proceedings before the Commission in Docket 9113 (In re Promulgation of Rules Governing Broadcasting of Lottery Information) is filed herewith and incorporated herein by reference as Exhibit A.

4. Plaintiff broadcasts one or more programs which contain features comprehended by one or more of the rules in issue in this case. After such rules become effective, the failure of plaintiff to discontinue the broadcasting of any or all of such programs would result in setting for hearing applications for renewal of licenses filed by plaintiff and, upon a finding that such programs have been or will continue to be carried, such applications would be denied in accordance with the policy set out in the rules in issue.

5. Attached hereto as Exhibits B and C are true photostatic copies of letters to the Commission dated, respectively, April 4, 1940 and April 11, 1940, and enclosures, received from radio station WGN, Inc. with respect to changes in the format of the radio program called "Musico" which were made prior to April 29, 1940.

6. Affiant submits, in response to the contentions of the plaintiff, that:

(a) The Order and the Rules in issue are a proper application of the public policy announced by the Congress of the United States which the Commission must consider in fulfilling its duties under the Communications Act of 1934, as amended, and since denial of a license on the ground that the public interest would not be served by a grant is authorized by Sections 307, 308, 309, and 312 of the Communications Act, the promulgation and enforcement of the Order and Rules in issue are not in contravention of Section 9 (a) of the Administrative Procedure Act;

(b) The Commission in determining the qualifications of an applicant to hold a broadcast authorization may consider
 171 the doing of acts which constitute a violation of a criminal statute of the United States which expresses public policy in the broadcasting field as a ground for determining whether the public interest would be served by the grant of a license;

(c) The Order and the Rules in issue are a proper and reasonable exercise of the Commission's functions under the Communications Act of 1934, as amended;

(d) The Order and the Rules are, as a matter of law, a correct interpretation of Section 1304 of the United States Criminal Code;

(e) The Order and the Rules do not violate Section 326 of the Communications Act of 1934, as amended;

(f) The Order and the Rules were issued in accordance with the Commission's Notice of August 27, 1948, after consideration of filed comments and briefs and an oral argument in which all interested parties participated, and were duly published in the Federal Register (14 F. R. 5429, September 1, 1949); accordingly the Order and the Rules in issue were promulgated in accordance with the provisions of Section 4 (a) and (b) of the Administrative Procedure Act;

(g) The Order and the Rules are not inconsistent with the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act; and

(h) The Order and the Rules do not violate any of the provisions of the Constitution of the United States or of the Amendments thereto.

7. Affiant submits that Exhibits A, B, and C are relevant to the above issues sought to be raised and that they show that the Order in issue is within the Commission's authority conferred by the Communications Act of 1934, as amended; that it is in accordance with the Commission's Notice of August 27, 1948, pursuant to which an oral argument on which the Order is based was held; that it is proper and reasonable and in the public interest, convenience and necessity; that it is not violative of any of the provisions of the Constitution of the United States; and that
 172 there is no genuine issue as to any material fact.

Benedict P. Cottone.

BENEDICT P. COTTONE.

Subscribed and sworn to before me this 11th day of August, 1952.

[SEAL]

FOREST L. McCLENNING,

Notary Public.

My commission expires January 15, 1953.

Exhibit B to affidavit

LAW OFFICES OF KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS

NATIONAL PRESS BUILDING
WASHINGTON, D. C.

Cable address; "CALD"

Louis G. Caldwell
Hammond E. Chaffetz
Howard W. Vesey
Reed T. Rollo

Resident partners

Donald C. Beelar
Percy H. Russell, Jr.
Edward K. Wheeler
James A. Norman

Main office
33 North La Salle Street
Chicago, Illinois
APRIL 4, 1940.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C.

Re: "Musico"

GENTLEMEN: By letter dated March 12, 1940, WGN, Inc., Chicago, Illinois, advised the Commission that the contract covering the "Musico" program which expired on March 15, 1940, would not be renewed unless all features of the program which might be considered to import the element of chance were eliminated from the program.

For your further information we wish to advise that the program was completely revised so as to eliminate all features which might be considered to import the element of chance, and the contract with the sponsor, National Tea Company, was renewed covering the revised program.

Continuities of the revised or "New Musico" as broadcast on Friday evening, March 22, and Friday evening, March 29, 1940, are enclosed herewith for your information as well as a letter dated March 28, 1940, from B. B. Harris of the Kastor Advertising Agency which handles the account and a letter dated March 28, 1940, from James Holtzapple, Manager of the Lloyd D. Herrold and Associates Contest Administration, the independent judging agency which judged the contest. These two letters, each addressed to Mr. Keith Masters of the Chicago office of Kirkland, Fleming, Green, Martin & Ellis, contain information relative to the number of telephone calls received and the manner in which entries were judged for the contest of March 22, 1940.

The details of the program as broadcast on March 22, 1940, are as follows:

The Musico cards have printed on them five rows of squares with five squares in each row. Song titles appear in four of the five squares in each row and the fifth square in each row is blank.

The cards are available, free of charge, at all of the stores of the sponsor, at the studios of WGN, and to some extent are also distributed from house to house.

174 All cards distributed are capable of completing one row, i. e., during the course of the program sufficient tunes are played to enable any contestant who identifies the titles to check four squares in a row on his card.

During the course of the program one original unnamed composition is played and the contestants are instructed to name the composition and to insert their suggested title in any blank square on their cards, thus completing a row.

All contestants who successfully complete any row on the card are eligible for a prize. Those who wish to compete for a cash prize are instructed to telephone Harrison 6912 at any time up to 10 p. m. of the night of the program (the program is broadcast from 8 to 8:30 p. m.). The fact that there is no need to hurry in making the telephone call is stressed in the continuity. Those who desire to compete for a merchandise prize are instructed to deposit their entries at the closest store of the sponsor before 6 p. m. of the following day.

If a contestant telephones in order to compete for a cash prize, he is not eligible to compete for a merchandise prize.

The telephone entries (those competing for cash prizes) are judged by an independent judging organization whose staff reads and gives careful consideration to every entry and selects the winners on the basis of originality, suitability and aptness of thought of the suggested song title for the original composition. The names of the winners are announced over Station WGN at 10:30 p. m. of the evening of the broadcast and the prizes are immediately dispatched by Postal Telegraph money orders.

The entries deposited at the stores of the sponsor (those competing for merchandise prizes) are judged by the same independent judging organization and in the same manner as the cash prize entries, and the winners are notified by mail during the following week.

In case of ties, duplicate prizes are awarded.

In the formulation of the above-described plans it was recognized that a possible element of chance might be involved in that

portion of the contest requiring telephone calls, and, accordingly, every precaution was taken to make it possible for all
 175 contestants who so desired to complete their calls. Twenty-five telephone operators and twenty-five telephone lines were made available. Contestants were given until 10 p. m., i. e., one hour and a half following the close of the program, to complete their calls, and were advised that speed in completing the calls was not a factor in determining the winners. Prior to the program it was the unanimous opinion of all those connected with the program in any way, including the telephone company that supplied the lines, that there would be no difficulty in completing all calls. Unfortunately, however, it developed that the available facilities and time allowed were not sufficient to accommodate all incoming calls.

Immediately following the broadcast of March 22, 1940, it was decided to eliminate telephone calls from the contest entirely in order to remove the possible chance element thus involved. However, rather than eliminating the calls entirely without advance notice to the public, the following plan was conceived:

For the program of March 29, 1940, only twenty-five merchandise prizes were to be awarded to those making telephone calls, with all contestants desiring to compete for the cash prizes and 1,000 merchandise prizes being required to deposit their entries at the nearest store of the sponsor. Twenty-five operators and twenty-five telephone lines were to be made available for such calls as were made and the time limit in which to make the calls was to be extended for an additional half hour, i. e., until 10:30 p. m.

This change obviously discouraged the making of telephone calls and as a matter of fact substantially reduced the number of calls that were attempted. However, even with the reduced number of calls the available facilities were found to be inadequate. As a consequence the telephone calls will be eliminated entirely beginning with the next program on Friday evening, April 5, 1940. With the telephone calls eliminated all entries are to be deposited at the stores of the sponsor.

With the exception of the elimination of the telephone calls the details of the program to be broadcast in the future are the same as above-described for March 22, 1940.

If any further information is desired concerning this matter, kindly communicate with the undersigned.

Very truly yours,

WGN, Inc.,
 By REED T. ROLLO,
Its Attorney.

176 H. W. KASTOR & SONS ADVERTISING COMPANY,
INCORPORATED

Chicago, New York, St. Louis

CHICAGO

London Guarantee Building

MARCH 28, 1940.

MR. KEITH MASTERS,
McCORMICK, KIRKLAND, FLEMING,
MARTIN, GREEN and ELLIS,

33 North LaSalle Street, Chicago, Illinois.

DEAR MR. MASTERS: In accordance with your telephone request of this morning, wish to inform you that on the broadcast of Musico on March 22, 1940, there were 1734 telephone calls received between the hours of 8:00 o'clock and 10:00 o'clock, P. M. Of these calls, 1350 had correctly checked a row across on a Musico card and submitted a song title for the unnamed song played during the program in three words. The telephone calls were handled by twenty-five special operators.

Six associates of Professor Herrold were present and they read the 1350 song titles submitted by the contestants. From these entries, they selected the five cash prizes and the winners were announced from the station at 10:30 o'clock, P. M., as previously announced during the program.

Professor Herrold is writing you a letter outlining the basis upon which his associates judged the entries, both on the telephone and for grocery bags.

I trust that this will give you the information you desire.

Yours very truly,

H. W. KASTOR & SONS, ADVERTISING
COMPANY,
B. B. Harris.
B. B. HARRIS.

LLOYD D. HERROLD AND ASSOCIATES

CONTEST ADMINISTRATION

Howard-Clark Building, Chicago—Telephone Briargate 8027

MARCH 28, 1940.

MR. KEITH MASTERS,
KIRKLAND, FLEMING, GREEN AND MARTIN,
33 North LaSalle Street, Chicago, Illinois.

DEAR MR. MASTER: This is to certify that we have examined 1,350 entries received for the telephone contest of Musico which was broadcast on March 22, 1940. Entries were judged on the basis of originality, suitability, and aptness of thought. Five entries were selected by a staff of preliminary judges and myself to receive the cash awards.

We also examined 166,667 entries which were sent to us by the National Tea Company. These entries had been deposited in boxes in the stores by the contestants. From the above number we selected 1,000 entries to receive the bag of grocery prizes. The judging was done on the basis of originality, suitability, and aptness of thought.

In judging a contest of this kind our first step is to open and count all entries. The entries are then read by a staff of experienced readers. These readers select the best entries as they read and then meet as a group to go over the selected entries to further reduce the number of final judging. After going over these remaining entries many times the writer personally selected the 1,000 grocery winners and the winners of the cash awards.

May I assure you that each and every entry was read and given careful consideration by our experienced staff.

Very truly yours,

LLOYD D. HERROLD AND ASSOCIATES,
James Holtzapple,
JAMES HOLTZAPPLE, *Manager.*

178

Exhibit C to affidavit

LAW OFFICES OF KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS

NATIONAL PRESS BUILDING
Washington, D. C.
Cable address "CALD"

Louis G. Caldwell
Hammond E. Chaffetz
Howard W. Vesey
Reed T. Rollo

Resident Partners

Donald C. Beelar
Percy H. Russell, Jr.
Edward K. Wheeler
James A. Norman

Main Office
33 North La Salle Street
Chicago, Illinois
APRIL 11, 1940.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C.

Re: "Musico"

GENTLEMEN: Further supplementing my letter of April 4, 1940, concerning the revised Musico program being broadcast over Station WGN, I submit herewith on behalf of WGN, Inc., a copy of the continuity of Musico as broadcast on Friday evening, April 5, 1940. It will be noted that this continuity eliminates telephone calls entirely from the program.

Very truly yours,

WGN, Inc.,
By REED T. ROLO,
Its Attorney.

179 H. W. KASTOR & SONS ADVERTISING COMPANY, INC.
RADIO DEPARTMENT

Client: National Tea Company.
Product: National Food Stores.
Program: No. 29—Musico.
Talent: Two Announcers.
Date of Broadcast: Friday, April 5, 1940.
Time: 8:00—8:30 p. m.
Outlet: WGN—Chicago.
Comments on Broadcast:
Commercial Content: Roller Skate Offer.

Word Count: 440.

Alteration No. 1.

Pages 2 and addition of Page 2A.

Date written: April 5, 1940.

Important! Special instructions! This alteration takes the place of corresponding pages in your copy of this continuity. Please compare page numbers carefully, insert these new pages, and destroy the old ones.

Alteration notes: Alteration consists of rewording rules.

180 ORCHESTRA. Opening theme * * * dim for
BUSINESS. (Crowd noise.)

ANSON. (Address through megaphone effect) Welcome one and all to radio's most fascinating and exciting game—Musico—featuring Harold Stokes and his orchestra, Pierre Andre, and your Master of Musico—Bill Anson! * * * Let's go Musico. [Applause.]

ORCHESTRA. Quick segue into new theme.

ANDRE. Good evening, everyone! Here are the big cash winners of Musico last week. William Sonnenburg, 9644 Brandt Avenue, Oak Lawn—the big \$200 gold award. Mrs. Foster Bachman, W. Michigan Avenue, Marshall, Michigan, \$50.00. Carol Chase of 7048 Washtenaw Avenue, Chicago, \$25.00. Perle Palmer of 311 Jefferson Street, La Porte, Indiana, \$15.00; and Mrs. Amelia Frost of 304 Park Avenue, St. Charles, Illinois, \$10.00, and 1,000 grocery bag winners. (Quick applause.) Yessir, this is your Musico, with more fun, thrills, more prizes and still more prizes—and a bigger chance for everyone! Musico, a copyrighted feature, is brought to you every Friday at this time by the National Food Stores, and is played with Musico cards which you get absolutely free at all National Food Stores, in meat and grocery departments, and which are distributed house to house as well as at Station WGN. You don't have to buy a thing. Musico cards are free. Play with more than one card—increase your chance of winning!

ORCHESTRA. New theme up and out.

ANDRE. And here's your Master of Musico, Bill Anson. [Applause.]

181 ANSON. Thanks, Pierre, and a very good evening to you, Musico friends. Now please listen carefully while I give you the rules of our big Musico. As the orchestra plays a song, identify it and check it off on your cards. As soon as you have correctly checked four songs across any one line, you are eligible to compete for one of tonight's big cash prizes—or for one of the 1,600 big shopping bags of groceries—not a thousand—there are 600 more this week—that's 1,600 big shopping bags of groceries.

Only entries dropped into Musico boxes or mailed can compete. Please don't phone. There are five cash prizes tonight. Here they are: First prize is the big gold award of \$200.00 * * * that's right—\$200. Other cash prizes are \$50.00, \$25.00, \$15.00, and \$10.00.

Play as many cards as you wish, friends. Remember if you aren't able to check out a line on the one card—by using more than one you increase your chances of checking out a line and you may win more than one prize. Now—during tonight's game, Harold Stokes and the Orchestra will play a new, original, and untitled composition.

182 ANSON. All you have to do is to give this song an original name which you write down in the blank space on your card to complete a full line across. Your title for tonight's original song must be four words—that's four words—and must be all about your best girl. And man, that should be easy! Now is that all clear? All you have to do is to check four songs across any one line on your card and write your original song title in the blank space to complete the full line. Next, write your name and address on the back of your card and drop it in the Musico prize box in your National Food Store tomorrow, Saturday, April 6, before 6 p. m. Please don't phone. Just drop your card in at your National Food Store. Increase your chances and this doesn't mean an extra trip for you because you can pick up

183 next week's cards at the same time. The winner of the big \$200.00 gold award, and the winners of the other cash awards and the one thousand 600 grocery bags will be notified by mail before Thursday, April 11, at 6 p. m. Postal Telegraph messengers will deliver Postal Telegraph money orders to the cash winners. So look for those big surprises! Enter as many cards as you wish, friends, and increase your chances of winning!

ORCHESTRA. Old Theme Up Briefly and Under

ANDRE. This is Pierre Andre again reminding you that tonight's big prizes are \$200.00—the big gold award; \$50.00, \$25.00, \$15.00 and \$10.00 and more than one thousand 600 big bags filled with delicious groceries. To compete for them, drop your card in the Musico Prize Box in your National Food Store tomorrow, Saturday, April 6th, before 6 p. m. Increase your chances of winning—use more than one card. A recognized group of judges will select winning song titles. Entries will be judged for originality, suitability and aptness of thought. Duplicate prizes will be awarded in case of ties and no entries will be returned. Decisions of the judges are final. Entries, contents and ideas therein become the property of the National Tea Company. All parties entering the contest give the National Tea Company permission

to use their name, address, and title submitted for advertising and publicity purposes. Remember—it is possible to win with every Musico card you get. And now—here comes your Man Friday, again your Master of Musico, to start the fun. Bill Anson.

ANSON. And start the fun isn't even the half of it, Pierre!
 'Cause there's fun, thrills, and surprises, you know; on Na-
 184 tional's big game—Musico.

ORCHESTRA. In an Old Dutch Garden.

ANSON. Well—no doubt most of you guessed that one easily—the title of that song was In an Old Dutch Garden * * * if you have In an Old Dutch Garden on your card, put a big X right over it—because that's how you play Musico. But from this point on, you're going to have to figure out the names of the songs for yourself. Now the idea is to fill a row—across on National's Musico.

ORCHESTRA. On the Isle of May (special arrangements * * * no hints).

ANSON. Now—here he comes—that smiling, debonair Man-about-Music—our genial musical conductor—Harold Stokes. [Quick applause.]

HAROLD. Good evening, Musico friends. I'd just like to tell you that my boys and I have one or two little musical surprises in store for you tonight—and we hope you'll enjoy them.

ANSON. That's great, Harold * * * And I think it's wonderful, too, how happily you and the boys in the band get along.

HAROLD. Well, Bill—that's because we all speak the same language—

BAND. (Short single sentences in as many languages as possible.)

ANSON. All speak the same language, eh?

HAROLD. Well—er—when we're playing pinnoche—yes!

ANSON. (Laughing.) Well, I don't know much about pinnoche—

HAROLD. So the boys tell me!

ANSON. —but I do know the language of music is universally understood. Especially when it's beautiful music like we have in this next number. It's National's radio game, you know:
 185 it's bigger and better—Musico.

ORCHESTRA. Over the Rainbow.

ANSON. And how are you Musico tune detectors making out? Are you filling out a line? That's the idea—and that's how you win New Musico. And what prizes we have again tonight! Five—that's five big cash prizes starting with the big \$200.00 gold award—and one thousand 600 big bags full of groceries. When you have filled a line across and written in your title for tonight's original song, drop your card in the Musico prize box at your

National Food Store tomorrow before 6 o'clock. Submit as many cards and titles as you like—and dropping your cards at your National Store makes it much easier for you to win and gives everyone a swell chance at those big prizes. There's lots of cash and groceries, so; come and get 'em with Musico.

ORCHESTRA. In a Little Spanish Town.

ANSON. And now we come to the number I'm sure you've all been waiting for—tonight's original song for which you Musico tunesmiths are to write an original title. I think Harold Stokes has something to say about this * * * Harold?

HAROLD. Indeed I have, Bill. I'm sure all of you will be most interested to hear that tonight's original tune was written by none other than my good friend and colleague, Griff Williams. Griff, I understand, plans to use this song on the networks from the Stevens Hotel in the very near future.

ANSON. Well! And you know what that means, don't you, folks? It means that the Musico tunesmiths sending in 186 the winning \$200.00 gold award title will automatically share equally—with Griff Williams—in any and all royalties the song may earn. Think of it! Your winning song title may earn you hundreds of dollars—or it might start you on a profitable song-writing career. Tonight's song title must be in four words—four words—and be all about your best girl. And that should be easy! Can't you just see her? * * * Twinkling, smiling eyes; an adorable little nose and cute, cupid's bow mouth * * * and maybe she had dimples when she smiles. She's a man's ideal—she's the best girl! * * * Your title must be in four words, you know; it's the original song on Musico.

ORCHESTRA. Original song (2 choruses).

ANSON. And how did it strike you? Couldn't you just picture her? The best girl. Mm-mm! Now let me remind you, folks, when you've checked your row across and written in your original song title to complete the row, write you own name and address on your card and drop it in the Musico prize box at your National Food Store before 6 p. m. tomorrow—Submitting your entries in this way makes it easier for everyone and gives every Musico player a swell chance to win one of those big cash and grocery prizes. Play as many cards as you wish. If you can't check out a line on one—you may on another—and you'll have more chances of winning. Harold and the boys will play the original song a little later in the program. The prizes are really big, you know; on National's game—Musico.

ORCHESTRA. One cigarette for two.

187 ANSON. And that, my friends, is a Scotchman's idea of a swell tune. Remember now—there are five big cash prizes on tonight's game. The big gold award of \$200.00; and four

others, \$50.00; \$25.00, \$15.00 and \$10.00 and those one thousand 600 big shopping bags of high-grade groceries that are well worth winning. You write a title and fill a row, to win big prizes on Musico.

ORCHESTRA. Anchors Aweigh.

ANSON. Comes the time now for one of Harold Stokes' musical surprises he promised you earlier in the evening. Just about now, Handsome Harold is mussing up his hair as he dons the old squeeze box—piano-accordion to you—to give you Musico tune-smiths a real treat.

TRUMPETS. (Laughing effect.)

ANSON. And I see your band is right behind you, Harold!

HAROLD. Yeah—sixteen mice and a man!

ANSON. Don't let 'em kid you, Harold. And now, ladies and gentlemen, Harold Stokes on the accordion playing—Musico.

SOLO. Angela Mia * * * (No hints.)

ANSON. Friends, if you heard any noises that sounded as if they didn't belong in the solo, that was the pleats of Harold's accordion picking the buttons off his vest every time he squeezed it. And how are those song titles coming? You're getting lots of them? That's great because you can include a different title with every row you check across on as many Musico cards as you have. Play more cards—win more! So now—let's go with Musico.

ORCHESTRA. Goodnight Sweetheart.

188 ANSON. Now, while the maestro prepares appropriate music—here comes Pierre Bumpsadaisy Andre, who's a good skate in spite of a few loose wheels. Howya, Champ!

ANDRE. All that so-called humor on the part of Mr. Anson means I'm going to tell you mothers how you can get your children a pair of genuine Irving Jaffee Olympic Champion roller skates for only 99¢. Yes, actually only half the regular nationally advertised price of \$1.99—when you purchase \$3.00 worth of groceries from your favorite National Food Store. These are sturdy, nationally sold and nationally advertised skates, designed and named after the greatest skater the world has ever known—Irving Jaffee. And they're sold in better stores all over the country at the nationally advertised price of \$1.99. They're long-lasting, built of strongest type heavy steel—have ball bearing wheels and extra heavy rubber cushion shock absorbers—and are adjustable to any boy or girl from five years of age up to the size of an adult. All you do to get them is get a special Irving Jaffee Olympic Champion roller skate card absolutely free, at your favorite National Food Store. Buy any groceries you want from now until May 15th. With each purchase your card will be punched. When you have completed \$3.00 in purchases at National's regular low, money-saving prices, you will be given a pair of these marvelous

skates at one-half the regular price—99¢. Remember, this offer expires May 15, 1940. So get your Irving Jaffee Olympic Champion roller skate card tomorrow morning—without fail. Now Bill Anson has a word for the younger members of our audience.

ANSON. You bet I have. And say, kids! Just wait till you get a glimpse of these wonderful skates. Boy, how proud you'll be to go zipping and zooming down the street on these ball-bearing balloon-tire wheels! And say—they have special exclusive patented wing-toe clamps that fit any shape of shoe without tearing or coming off. Boy! Are those clamps speedy looking! What's more—each skate is further equipped with genuine lambs-wool ankle protectors—and heavy genuine leather straps with the autograph of Irving Jaffee on each and every one. So—boy, oh, boy! Don't miss this special chance to get Irving Jaffee Olympic Champion roller skates. Have your mother get one of these Irving Jaffee roller skate cards at your nearest National Store tomorrow morning. And be sure you get your Olympic Champion roller skates before this wonderful offer ends, May 15th. Don't miss out. And now let's get on with the show—It's National's game—Musico.

ORCHESTRA. Small Fry.

190 ANSON. And were you Musico tunesmiths able to recognize that one? Remember—as soon as you've checked four songs across any row on your Musico cards, write in your title for tonight's original tune by Griff Williams. Then write your name and address on the backs of your cards—you may play as many as you like—and drop them in the Musico prize box at your National Food Store tomorrow before 6 o'clock. Compete for that \$200.00 gold award. And all the prizes have value, you know; on National's big game, Musico.

ORCHESTRA. Tumblin' Tumbleweed.

ANSON. Yes, yes, yes! Now it seems like Podner Stokey from the Skokey country has a word for you hombres. How 'bout it, Harold?

HAROLD. Right, Bill. Friends, whenever a band wants to start something it usually picks on a guitar—and the man doing the picking in this case is Oley Drugan.

ANSON. Oley Drugan—you mean the fellow that plays all those instruments—violin, trumpet, clarinet, and—stuff?

HAROLD. Right again, Bill. As soon as he could walk, Oley played on the guitar—

ANSON. And before that I guess he played on the linoleum, is that the idea? * * * Be that as it may—here comes Oley Drugan on the guitar playing—Musico.

ORCHESTRA. Careless (special arrangement * * * guitar solo * * * no hints).

ANSON. Our thanks to you, Oley, that was a bit of all right. And how are you tunesmiths making out? Are you playing tonight's game with more than one card? You can, you know.

191 Play as many cards as you wish—you'll stand more chances of winning—Musico.

ORCHESTRA. It's a Blue World.

ANSON. And how are you making out? You're going to win one of tonight's big prizes? Swell! You should see those big grocery bags National is giving away this week. Chock full of delicious groceries that every member of your family will enjoy * * * Each one of the one thousand 600 is well worth winning. It's fun to play and win, and so; fill out that line for Musico.

ORCHESTRA. Merry Widow Waltz.

ANSON. What could you do with \$200.00? Can you imagine the thrill that would be yours if when you answered your doorbell, a Postal Telegraph messenger handed you a Postal Telegraph money order for any one of tonight's cash prizes? You'd like to be thrilled like that? Then get busy and fill a row—To win big prizes on Musico.

ORCHESTRA. In the Gloaming (special arrangement—no hints).

ANSON. Comes time again for Harold and the boys to play tonight's original Musico tune. And here's smilin' Harold to tell you something about it.

HAROLD. Friends, radio has accomplished many marvelous things. It has brought top entertainment, news events, and personalities right into your homes. Now, New Musico brings America's world-famous Tin Pan Alley right into your own living room.

192 ANSON. Folks, Tin Pan Alley, where most of our popular songs are written, is considered heaven by all young American composers.

HAROLD. Yes—and the other place by people who live in the neighborhood. But seriously, tonight's new song, written by Griff Williams, will be played over the networks very soon bearing the winning title that one of you will fill in tonight. So—good luck!

ANSON. And that title can be yours, friends. Your title must be in four words and be all about your best girl—that adorable little sweetheart that every man pictures in his romantic mind's eye * * * Sweet, lovely—a man's ideal. It's a new Griff Williams tune, you know: Give it a title on Musico.

ORCHESTRA. Original Tune (Special Arrangement * * * No Hints).

ANSON. Aw—come on—complete your row. Remember—on top of all it is possible to win in the way of prizes, your song title, if selected as the \$200.00 gold award winner, will earn you fifty percent of any and all royalties the song may earn * * * And with Griff Williams as your partner you stand a chance of making hundreds of dollars. Get busy now and fill a row; write in your title—Musico.

ORCHESTRA. Indian Summer.

ANSON. You Musico tunesmiths shouldn't have had any trouble recognizing that one—No sir! Well—Harold seems to have his gas house gang in order—So let's go—Musico.

193 **ORCHESTRA. Confucius Say.**

ANSON. (Chinese) Wise is Musico fan who play more than one card—Gleater is chance to win cash or big blag gloclies—maybe both—who knows? * * * That's right, all right. Now, friends, when you have checked any line across your Musico card, write in your own original title to fit tonight's original Musico tune and so complete your full line across. Then write your name and address on the back of your card—or cards—and drop them in the Musico prize box in your National Food Store tomorrow, Saturday, April 6, before 6 p. m. Don't phone—just drop your card or cards at your National Food Store tomorrow. In this way, you have a swell chance of winning one of tonight's five big cash prizes * * * The \$200.00 gold award, \$50.00, \$25.00, \$15.00 and \$10.00, or one of the one thousand 600 big grocery bags National is giving away this week—big shopping bags, jammed full of delicious, high quality National merchandise that'll save you many a dollar when you come to do next week's shopping. All winners will be notified by mail before 6 p. m. Thursday, April 11, and Postal Telegraph messengers will deliver Postal Telegraph money orders to the cash winners. So, don't forget—drop your Musico cards in the Musico prize box tomorrow before six—and it won't mean an extra trip for you because you can pick up next week's cards at the same time. Remember the gold award of \$200.00 can be yours—plus the hundreds of dollars you can possibly earn by sharing equally with Maestro Griff Williams in the royalties tonight's Musico song may earn. Next week's Musico cards will be blue and white and only blue and white Musico

194 cards can win. So be sure to pick up your blue and white Musico card at your National Food Store tomorrow when you drop this week's card in the Musico prize box. Good Luck! This is Bill Anson, your Master of Musico saying good luck again and good night till next Friday night at this same time.

ORCHESTRA. Old Theme up * * * Quick Seque Into New Theme.

ANDRE. Musico cards are distributed in the vicinities of National Food Stores located in Illinois, Iowa, Michigan, and Indiana. [Short pause.] The fascinating game of Musico is brought to you every Friday at this time by National Tea Company Food Stores. Music is under the direction of Harold Stokes. Play Musico and win. This is Pierre Andre—goodnight all. Musico is a copyrighted feature. [Applause.]

195 In United States District Court, Southern District of
New York

Civil 52-24

AMERICAN BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Civil 52-37

NATIONAL BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Civil 52-38

COLUMBIA BROADCASTING SYSTEM, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Before CHARLES E. CLARK, Circuit Judge; VINCENT L. LEIBELL,
District Judge; EDWARD WEINFELD, District Judge

196 G. B. Zorbaugh, Esq., 30 Rockefeller Plaza, New York
20, N. Y.

Cravath, Swaine & Moore, Esqs., 15 Broad Street, New York 5,
N. Y.

Attorneys for American Broadcasting Company, Inc. (Alfred McCormack, George B. Turner, Charles Myneder, Of Counsel); Cahill, Gordon, Zachry & Reindel, Esqs., 63 Wall Street, New York 5, N. Y.

Attorneys for National Broadcasting Company, Inc. (Paul W. Williams, Gustav B. Margraf, Thomas E. Ervin, Dudley B. Tenney, Of Counsel); Rosenman, Goldmark, Colin & Kaye, Esqs., 575 Madison Avenue, New York 22, N. Y.

Attorneys for Columbia Broadcasting System, Inc. (Ralph F. Colin, Max Freund, Andrew J. Schoen, Of Counsel).

197 Newell A. Clapp, Acting Assistant Attorney General;
Myles J. Lane, United States Attorney for the Southern

District of New York; Nathan Skolnik, Assistant United States Attorney; Attorneys for the United States.

James E. Kilday, William J. Hickey, Special Assistants to the Attorney General, Attorneys for the United States.

Benedict P. Cottone, General Counsel; J. Roger Wollenberg, Assistant General Counsel; Daniel R. Ohlbaum, Erich Saxl, Richard T. Conway, Counsel; Attorneys for the Federal Communications Commission.

198

Opinion

(Filed February 5, 1953)

LEIBELL, D. J. :

These three actions were instituted in August 1949 to enjoin and set aside an order of the Federal Communications Commission adopting certain interpretative rules of the Commission in relation to "give-away" programs on radio and television.¹ Jurisdiction of this three-judge court is based on the provisions of the Federal Communications Act [47 U. S. C. § 402 (a)] and the United States Judiciary and Judicial Procedure Act [T. 28 U. S. C. §§ 1336, 1398 and 2284]. The right to a judicial review of the action of the Federal Communications Commission is also asserted by the plaintiffs under Section 10 of the Administrative Procedure Act [5 U. S. C. § 1009].

The report of the Commission (released August 19, 1949) is entitled "In the Matter of Promulgation of Rules Governing Broadcast of Lottery Information" and states in its opening paragraphs that :

"The Commission has this day determined to adopt the attached interpretative rules, set forth in the appendix to this Report, to be designated as Sections 3.192, 3.292 and 3.692. These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 199 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest. A Notice of Proposed Rule Making concerning this subject was issued by the Commission, on August 5, 1948, and a Supplemental Notice of Proposed Rule Making was issued on August 27, 1948. Interested parties were afforded an opportunity to file briefs or statements setting forth

¹A similar action was brought in the District Court for the Northern District of Illinois and a temporary restraining order issued on September 13, 1949.

why they believed the rules should or should not be adopted and oral argument on the matter was held before the Commission en banc on October 19, 1948."

The subsequent legal proceedings are summarized in the brief of defendants' counsel, in the American Broadcasting case, as follows:

"The Commission's order provided that it would go into effect on October 1, 1949. On August 31, 1949, plaintiff filed its complaint in this action. On September 19, 1949, Judge Rifkind convened a statutory court consisting of Judge Clark, Judge Leibell and himself, and on September 23, 1949, having heard a motion by plaintiff for a temporary restraining order, Judge Rifkind issued a restraining order and set down the application for an interlocutory injunction for hearing before the three-judge court at a later date. That application, however, did not come on for hearing because, following Judge Rifkind's issuance of a temporary restraining order, the Commission on its own motion postponed the effective date of its proposed rules until 30 days after final decision in this and the co-pending actions.

Following a number of discussions between counsel for the Commission and counsel for plaintiffs in the several actions, it was agreed that the cases could be and should be presented to the Court in a form not requiring a decision on questions of fact. For that purpose, amended complaints were prepared in the several actions and the amended complaint in the present action
200 was filed on September 22, 1952. On the same day plaintiff moved on the complaint, a supporting affidavit and a stipulation with defendants' counsel, for summary judgment, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment."

The stipulation in each action provided that all the allegations of the amended complaint be taken as admitted by the defendants and that either plaintiff or defendants may rely upon facts set forth in the amended complaint in the companion actions and upon any of the affidavits filed in either of said companion actions by either plaintiff or defendants therein.

The three-judge court was thereafter reconstituted by the designation of Judge Weinfeld in place of Judge Rifkind, who had resigned as a District Judge. The motions in the three actions were consolidated for argument and were argued on December 15th, 1952.

THE PLEADINGS AND MOTIONS

The amended complaint of the American Broadcasting Company alleges jurisdictional facts and specifies the statutes under which the action is brought; it recites the adoption of the Rules by the Commission, the institution of the action, the parties there-

to, the plaintiff's extensive broadcasting and television business and its large investment in broadcasting facilities for radio and television programs. Paragraphs 11 and 12 of American's amended complaint alleges:

201 "11. Plaintiff has expended substantial sums of money in building up among the public, advertisers and broadcasting stations a valuable reputation and good will for the broadcasting stations it owns and operates and for the programs broadcast by its stations and furnished to affiliated stations for broadcasting by them. From time to time, plaintiff broadcasts programs having as the central feature the conduct of a contest in which prizes are awarded to the successful contestants. Such programs, or some of them, are within the terms of the Rules defining the types of programs which the Commission 'will in any event consider' as violations of Section 1304 of the Criminal Code, although none of such programs constitutes, or has been held by any court to constitute, a lottery, gift enterprise or similar scheme in violation of said Section. Such programs have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public. Many persons listen to, view and enjoy such programs although for one reason or another they are not eligible to win a prize. Such programs are highly popular, have contributed substantially to the reputation of and good will of plaintiff's stations and those affiliated with it and have produced substantial revenues and profits for plaintiff.

"12. Among such programs which are or may be within the terms of the Rules, and which we are informed and believe the Commission considers as coming within the Rules, are the following:

"'Stop The Music' (radio show).

"'Stop The Music' (television show)."

The amended complaint further alleges that unless the Commission's Order and the Rules be permanently enjoined and set aside, plaintiff's applications for renewal licenses for its broadcasting stations and for permits or licenses to extend its system will automatically be denied and its investments will be destroyed;

202 or in any event plaintiff will be forced to discontinue the broadcasting of programs which may be within the Commission's Rules and plaintiff will suffer irreparable injury; that the Order and Rules are beyond the jurisdiction and authority of the Commission, violate the provisions of the Administrative Procedure Act, and are illegal and void; that the Rules are in violation of certain provisions of the Constitution of the United States and of the amendments thereto.

The prayer for relief asks that a three-judge court be constituted to hear and determine the action; that plaintiff be granted an interlocutory injunction; and that upon final hearing and determination of this action, the court "enter a decree permanently enjoining, setting aside and annulling said Order of the Commission adopted August 18, 1949, and the Rules adopted thereby."

Annexed to the amended complaint of the American Broadcasting Company is a description of its "Stop The Music" program—the radio version and the television version. The contestants are of two kinds: telephone participants and studio participants. The telephone participants are selected by lot or chance from telephone directories. The telephone participant is not required to be listening at his radio to the broadcast at the time he is called. If the telephone participant fails to identify the melody, a studio participant is given an opportunity to do so. The prizes are furnished by the manufacturer, in return for a brief
 203 advertisement of his product. Those who are selected from the television audience express in advance, through postcards, their desire to participate. From the cards received a random selection is made and the participants are telephoned.

An affidavit of G. B. Zorbaugh, Secretary and Acting General Attorney for American, is submitted in support of American's motion for a summary judgment. Annexed to it are many exhibits which are also annexed to the affidavits submitted by National or Columbia. They will be hereinafter considered. But one thing should be noted now. The Solicitor of the Post Office Department in a letter of May 9, 1949, advised American that the postcard in relation to the "Stop The Music" program would not be regarded as unmailable matter under the postal lottery statute. He added that whether or not the program conflicted with Section 1304 would be for the Federal Communications Commission to determine.

Further, in May 1949 the Solicitor of the Post Office sent the attorneys for the Columbia Broadcasting System a copy of a general ruling made by the Solicitor for the benefit of all the postmasters, in February 1947, from which the following is quoted:

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment
 204 on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for

the prize, consideration is not deemed to be present." (P. O. Bulletin February 13, 1947.)

The amended complaint of the National Broadcasting Company alleges the jurisdictional basis of the action; the order and rules of the Federal Communications Commission; the extent of the National Broadcasting Company's radio and television network; the annual income from the programs of National Broadcasting Company that would be affected by the Commission's Order and Rules; and a description of its four programs thus affected. "You Bet Your Life" is a studio audience participation program; "The \$64 Question" is also a studio program; "What's My Name" is a studio and listening audience program; and "Double or Nothing" is a program in which the primary participation is by members of the studio audience, although members of the listening audience are invited to submit questions on a label of one of the sponsor's products. On the "What's My Name" program there is a selection at random of participants from the listening audience.

The amended complaint alleges the importance of these programs to National Broadcasting Company and the danger to it of a loss of its license when it is up for renewal, if the Commission enforces its rules in relation to Section 1304 of the
205 United States Criminal Code. There are also allegations that the Commission is without power to promulgate or enforce the rules; that they incorrectly interpret Section 1304; that the rules violate provisions of the Communications Act and the Administrative Procedure Act; and finally that they are unconstitutional under the First, Fifth and Sixth Amendments, and under Clause 3 of Section 9 of Article 1 (Bill of Attainder). The prayer for relief asks that after final hearing, the three-judge court, adjudge and decree that the Commission's Order is beyond the lawful authority of the Commission, in violation of plaintiff's legal rights and wholly void; and that the Commission's Order be vacated and set aside and the enforcement thereof perpetually restrained and enjoined. Annexed to the amended complaint are the scripts of the National Broadcasting Company programs mentioned above.

To the affidavit submitted by Mr. Margraf, Vice President and General Attorney of National Broadcasting Company, on the motion for summary judgment, there are a number of exhibits annexed, among them the following: a copy of Chairman Fly's letter of December 30, 1943, addressed to Senator Wheeler, then Chairman of the Interstate Commerce Committee, asking that he support certain legislation (draft enclosed) directed at radio programs "where members of the radio audience not in the studio are selected by lot or chance to win a prize if they can show that

they were listening to the particular program." The draft
 206 of the proposed new Section 316 would have prohibited the
 broadcasting of "any program which offers money, prizes
 or other gifts to members of the radio audience (as distinguished
 from the studio audience) selected in whole or in part by lot or
 chance."

Mr. Margraf's affidavit also annexes copies of letters sent by
 the Commission's Chairman to the Attorney General's office in
 February and March 1940, calling his attention to the following
 programs "alleged to be in violation of Section 316 of the Com-
 munications Act of 1934." The "Meads Bakery Mystery Woman"
 program; the "Pot of Gold" program; the "Dixie Treasure Chest"
 program; the "Sears Grab Bag" program; the "Especially for
 You" program; the "Musico" program; the "Songo" program.
 On April 20, 1940, the Attorney General wrote the Commission
 that after a thorough examination of the material submitted, the
 Department had concluded that prosecutive action under Section
 316 should not be instituted in the matter of the "Pot of Gold"
 and "Meads Bakery" programs. On April 29, 1940, the Attorney
 General wrote the Commission that after careful consideration
 no action was warranted by the Department in the "Dixie Treasure
 Chest" program. On the same day similar letters were sent by
 the Attorney General to the Commission in respect to the "Sears
 Grab Bag" program, the "Especially for You" program, the
 "Songo" program and "Musico."

207 Mr. Margraf's affidavit also annexes documents showing
 that in 1939 the Solicitor of the Post Office made two con-
 tradictory rulings with respect to whether a radio program, known
 as "Musico," was a lottery. On July 1, 1939, he ruled that the
 program did not violate the Federal lottery laws. On Septem-
 ber 29, 1939, he ruled that the "Musico" program did violate the
 Federal lottery laws. When the attorneys for Columbia Broad-
 casting System inquired in 1949 about those two rulings, the Solici-
 tor of the Post Office replied on May 3, 1949: "It is likely that if
 the Musico plan were submitted to this Office today, it would be
 held, in view of the change reflected in the enclosed notice (a
 general ruling for all postmasters concerning prize activities dated
 February 13, 1947) not to conflict with the postal lottery laws."
 The Solicitor also ruled on March 2, 1950, concerning the radio
 program "Truth and Consequences" that the contest post cards
 were mailable, although they were used for a random selection of
 contestants. The Commission had issued its proposed interpre-
 tative rules in August 1949.

208 The amended complaint of the Columbia Broadcasting
 System alleges the statutory provisions under which this
 action was instituted; the corporate organization of plaintiff; and

the nature and extent of plaintiff's nationwide radio network and television network. It also alleges that "Sing It Again" and "Hit the Jackpot" are two network programs which involve the award of prizes; the revenue those programs produce; how the contestants from the listening audience are selected at random from phone books; and that on the "Hit the Jackpot" program studio contestants were selected by pre-broadcast interviews and non-studio contestants were selected by chance from post cards sent in. It is alleged that because of the Commission's Rules, sponsors have discontinued the programs; that there never has been any court adjudication that these programs violate Section 1304 of the United States Criminal Code; and that there is no finding of fact by the Commission that the said program or programs similar thereto "have had a demoralizing or other deleterious, harmful or evil effect on the public." The amended complaint further alleges that plaintiff's stations have a value of many millions of dollars which will be destroyed if its licenses therefor are not renewed. Finally, it is further alleged that the Commission's Rules do not correctly interpret and apply Section

209 1304 of the United States Criminal Code; that they violate provisions of the United States Constitution and amendments thereto; that they violate other statutes of the United States (the Communications Act and the Administrative Procedure Act); and that plaintiff will suffer irreparable damage unless it is accorded relief in this action. The prayer for relief seeks a permanent injunction and a judgment setting aside the Commission's order of August 18, 1949 and the rules adopted thereby.

Annexed to the amended complaint are transcripts of the program "Sing It Again" and of the program "Hit the Jackpot"; also copies of the Commission's Order, Opinion and Rules.

In support of its motion for summary judgment the Columbia Broadcasting System, Inc., submits an affidavit of Mr. Freund, one of plaintiff's attorneys, to which he annexes copies of the judgment (November 1939) in the case of Clef, Inc., v. Peoria Broadcasting Company in the Circuit Court of Peoria County, Tenth Judicial District, Illinois. That judgment held that the radio program "Musico" was not a lottery and did not violate any statutes of the United States. Mr. Freund also refers to various rulings of the Post Office Department; and to the opinions of the Attorney General in April 1940 in relation to a number of radio programs which were submitted by the Federal Communications Commission to the Department of Justice for action under Section 316 of the Communications Act. All

210 of these programs were listed and discussed in the affidavit submitted by the National Broadcasting Company on its

motion. The Commission's letter to Senator Wheeler dated December 30, 1943, is also referred to.

In each of the three actions the defendants filed no answer but made a counter motion for an order dismissing the amended complaint of the plaintiff or, in the alternative, directing that summary judgment be entered in favor of the defendants. The ground for the motion to dismiss the amended complaint is that "plaintiff fails to state a claim upon which relief can be granted." The ground of the motion for summary judgment is that the amended complaint and its exhibits, the affidavit and other papers show that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. Defendants' motion in each action was supported by an affidavit of the Commission's general counsel in which he recites the various steps taken preliminary to the adoption of the rules. The affidavit states that "oral argument was held before the Commission en banc" and that "Commissioners Coy, Chairman, Hyde and Jones did not participate in the adoption of the Report and Order of August 19, 1949, and Commissioner Hennock dissented from its adoption." He also states that the United States District Court, in the Northern District of Illinois, and this Court, having
211 decided to issue restraining orders, "The Commission, on September 21, 1949, issued an order postponing the effective date of said rules until at least thirty days after the ultimate determination of these actions."

The general counsel's affidavit further states:

"4. Plaintiff broadcasts one or more programs which contain features comprehended by one or more of the rules in issue in this case. After such rules become effective, the failure of plaintiff to discontinue the broadcasting of any or all of such programs would result in setting for hearing applications for renewal of licenses filed by plaintiff and, upon a finding that such programs have been or will continue to be carried, such applications would be denied in accordance with the policy set out in the rules in issue."

In defendants' notice of motion in the National Broadcasting Company action, defendants also ask that this court strike paragraphs 13, 14 and 16 of the amended complaint in that action, on the ground that "the programs described in paragraphs 13, 14 and 16 of the amended complaint are not within paragraph (b) of the rules in issue and these paragraphs are therefore immaterial and impertinent." National Broadcasting Company does not oppose defendants' motion to strike the paragraphs and for that reason the motion will be granted.

Section 1304 of Title 18 (the United States Criminal Code) provides:

"§ 1304. BROADCASTING LOTTERY INFORMATION.

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense. June 25, 1948, c. 645, 62 Stat. 763."

Said section 1304 is one of five sections (§§ 1301 to 1305) which constitute "Chapter 61—Lotteries" of Title 18. Section 1301 deals with "Importing or transporting lottery tickets"; Section 1302, with "Mailing lottery tickets or related matter"; Section 1303, with "Postmaster or employee as lottery agent"; Section 1304, with "Broadcasting lottery information"; and Section 1305, with "Fishing contests."²

The Federal lottery statute does not define a lottery. The term "lottery" should be given its usual or popular meaning.³ Since it was part of the Federal Criminal Statute for so

² The reviser's notes on these sections in connection with the 1948 Congressional revision of the United States Criminal Code show that Sections 1301, 1302, and 1303 are basically similar in language to corresponding provisions of the 1909 Revision. Section 1304 is practically the same as Section 316 of Title 47 U. S. C. (the Communications Act) which was adopted in June 1934.

The four sections (§§ 1301-1304 incl.) use the same terminology—"any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance." Section 1304 in another respect also uses the same terminology as Section 1302 which prohibits "the mailing of any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery" etc. Section 1302, according to the 1948 Reviser's Note, was derived from R. S. 3894 and various Acts dating back at least to 1876. It may be assumed that when Section 316 of the Federal Communications Act was originally enacted in 1934 as part of the Federal Communications Act, it was modeled on the U. S. Criminal Code provision against mailing lottery tickets and related matter (former § 336, U. S. Criminal Code). In fact a prosecution under the mailing statute (former § 336) was sustained where, as a result of advertising by radio broadcast, the mails were used in furtherance of a lottery. *Horwitz v. United States* (CCA (5) 1933), 63 F. 2d 506.

Section 1305 was not adopted until August 16, 1950. The Congress was prompted to adopt said section because the Postmaster General had ruled that "publications containing advertisement of fishing contests involving the three elements of prizes, consideration and chance" were unavailable under the lottery laws. The contestants were required to pay an entry fee. The Legislative History of Section 1305 (U. S. Code Congressional Service: 81st Congress, Second Session, 1950, Vol. 2, p. 3610) shows that the House of Representatives Committee favored the Bill because it was their "considered judgment that Congress, in enacting the lottery laws, never envisaged their application to such innocent pastimes as the typical fishing contest, which has a solid basis of respectability and wholesomeness far removed from the reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid."

³ *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 561; 54 C. J. S. 843 and 962, citing cases.

many years before the Federal Communications Act was adopted in 1934, the term "lottery" should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code.⁴ *Brown v. Duchesne*, 60 U. S. 183; *Burnet v. Harmel*, 287 U. S. 103; *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342; *N. L. R. B. v. John W. Campbell, Inc.*, 159 F. (2d) 184 (CCA (5) 1947).

ADOPTION OF THE COMMISSION'S INTERPRETATIVE RULES

The interpretative rules in relation to Section 1304 of the United States Criminal Code, which the Commission adopted August 19, 1950, read, as follows:

"**LOTTERIES AND GIVE-AWAY PROGRAMS.**—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting the broadcasting of any advertisement of or information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift, enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304.)

"(b) The determination whether a particular program
215 comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

⁴A "gift enterprise" is one in which the purchaser of an article is given a chance to win a prize. 54 C. J. S. 850. When a gift enterprise involves the essential elements of a lottery (chance, consideration, a prize) it is unlawful. *Matter of Gregory*, 219 U. S. 210.

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

[By the words "winner or winners" as used in paragraphs (1), (2), (3) and (4) of subdivision (b), the Commission intended to include "contestants," according to the Commission's counsel.]

Paragraph (a) incorporates the language of Section 1304. Paragraph (b) (1) applies to a "prize enterprise" as well as a lottery.

216 The proposed Rules were considered at a hearing of the full Commission at which these plaintiffs and other interested parties were present, on notice. The hearing afforded the plaintiffs an adequate opportunity to present the grounds of their objections in both oral argument and briefs, and they availed themselves of that opportunity. Exhibit "A," consisting of two bulky volumes submitted by the Government on these motions, shows how widespread and varied were the sources and contents of the responses received by the Commission concerning the proposed rules, and the comments of the various publications in relation thereto.

It was not necessary for the Commission to take testimony before adopting the Rules. The procedure followed by the Commission was appropriate for the matter under consideration. The rule-making power was exercised through a procedure that conformed to the Administrative Procedure Act. [T. 5 U. S. C. § 1003 (b).] The Commission was not adjudicating any controversy which would require a hearing and the application of trial procedure. That might come later, in a specific case, when an application for a renewal license would be under consideration.

RULE-MAKING POWER OF THE COMMISSION

The Communications Act specifically empowers the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions" [T. 47 U. S. C. § 154 (i)]; and Section 303 (r) grants the Commission the same rule-making power "to carry out the provisions of this chapter." The Commission had the authority to make orders, rules and regulations in relation to broadcasting programs to implement the provisions of Section 1304 of Title 18 U. S. C. (formerly § 316 of the Federal Communications Act), and could proceed by general rule or by individual ad hoc decisions in its discretion. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U. S. 194. The Commission did not have to await a judicial determination declaring a certain type of program to be in violation of said sections before formulating its Rules. But the Rules could not declare certain types of programs to be lotteries, if as a matter of law they were not lotteries and would not constitute a violation of said sections. The authority to make rules is not the power to make law. *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 190 F. (2d) 326 (CCA (6) 1951).

The rules as adopted, constituted a warning to all existing licensed broadcasting stations that, if their "give-away" programs violated the new rules, that fact would be considered by the Commission when the stations made application for a renewal of their licenses. Under Section 307 of the Communications Act of 1934, as amended, no broadcasting license may be granted for more than three years or for more than five years in the case of other licenses. License renewals are similarly limited. An applicant for a renewal license is entitled to a hearing on his application. [§ 309 (a) of the Act.] The Commission may refuse to renew a license for a violation of any regulation authorized by the Act. [§ 312 (a).] The refusal to renew a license for a violation of the Commission's rules is in effect a sanction to enforce compliance with the rules, but it is a proper exercise of the Commission's power if the station has deliberately violated a rule of the Commission which had been duly promulgated and was within the scope of the Commission's rule-making powers. Section 9 (a) of the Administrative Procedure Act, prohibiting unauthorized sanctions, does not apply. *Regents of the Univer. of Georgia v. Carroll*, 338 U. S. 586. In any specific case the station would have the right to a court review of any order of the Commission declining to renew the station's license. [§ 402 of the Act.] But the enforcement of the Rules, by the refusal of a renewal license, would be a drastic penalty and sanc-

tion. *Columbia Broadcasting System v. United States*, 316 U. S. 407, 418.

Plaintiffs' counsel argue that these rules in relation to "give-away" programs are neither "necessary in the execution of its (the Commission's) functions," nor "necessary to carry out the provisions of this Act (the Federal Communications)." If it is a function of the Commission to determine who are properly

qualified to operate broadcasting and television stations
219 and to receive licenses or renewal licenses therefor [T. 47

U. S. C. § 303 and § 309], rules stating the required qualifications are necessary to the execution of that function of the Commission; and if under the provisions of the Act the Commission is required to pass upon applications for licenses and license renewals [§ 303 and § 309], rules barring applicants who would broadcast programs which would be in violation of a statute, are necessary to carry out the provisions of the Act. Even though it may not be a function of the Commission to enforce the criminal law, the Commission would have the power to bar any applicant who violated the criminal law. Section 1304 of the United States Criminal Code is so closely identified with the field in which the Commission functions that at one time it was part (§ 316) of the Federal Communications Act. The "public interest, convenience or necessity" standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding. Although Congress by a specific enactment authorized the Postmaster General to deny the use of the mails to lotteries and gambling schemes [39 U. S. C. § 259 and § 732; *Public Clearing House v. Coyne*, 194 U. S. 497], it was not necessary that Congress specifically authorize the Commission to take action against a broadcasting company which violated Section 1304 of the Criminal Code because the licensing power, specifically conferred on the Commission under Sections 303 and 309 of the Act, would include that authorization.

220 It is also urged by plaintiffs that Section 326 of the Act withholds from the Commission "the power of censorship" and bars the issuance of "any regulation which shall interfere with the right of free speech by means of radio communications" and that therefore the Commission was without the authority to issue these rules as to give-away programs. As will be shown later, the media of free speech are not above the provisions of the criminal law enacted for the protection of the general public; and the press, when using the mails, is barred under Section 1302 of Title 18 United States Code from doing the same things that broadcasting stations are prohibited from doing under Section 1304.

THE COMMISSION'S RULES [(B) (2), (3) AND (4)] WOULD APPLY TO PROGRAMS THAT ARE NOT CRIMES UNDER SECTION 1304 OF TITLE 18

A criminal statute must be strictly construed, even though it may be remedial in its nature and its purposes are to protect the general public. *United States v. Halseth*, 342 U. S. 277; *United States v. McGuire*, 64 F. (2d) 485 [CCA (2) 1933]. Rules of the Commission which are based on a criminal statute should likewise be strictly construed, especially where they are supported by a penalty and sanction more drastic than fines. *Columbia Broadcasting System Inc. v. United States*, 316 U. S. 407. The Rules cannot go beyond the Statute which they seek to implement. If the statute ought to be expanded to include give-away programs, that is solely within the province of Congress. *United States v. Williams*, 341 U. S. 70.

221 The plaintiffs' attorneys argue that the Rules fail to conform to the legal definition of a lottery, and that the Commission has erroneously interpreted Section 1304 of the United States Criminal Code. "The essence of a lottery is a chance for a prize for a price." *Commonwealth v. Wall*, 295 Mass. 70. The specific programs under attack by the government in these three actions offer prizes, and at least some of the contestants for the prizes are selected by lot or chance. In some instances, from the thousands of radio listeners a number of contestants are selected by the spinning of a wheel, which first determines the number of a phone book; next a page thereof; and finally a name and phone number on that page. The telephone number is then called and if the person answering is at the time listening to the program, or is able to give a "password" or an answer previously disclosed on the program, he becomes one of the contestants for the principal prizes. Even if he does not win, he receives a consolation prize on some programs. On television programs, the contestants, in some instances, are selected from the invisible audience at random, from postcards sent in by prospective contestants.

The contestants selected from studio audiences are usually interviewed in advance. Their qualifications are considered by the management before the selection is made. Where the contestants on the program come solely from the studio audience and
222 they are not selected by chance, it would seem that an essential element of a lottery is lacking. Where some of the contestants are selected by telephone calls in the manner above described, the Commission contends that the element of chance is involved in their selection. I agree with that contention.

THE ACT OF LISTENING TO A BROADCAST OF A "GIVE-AWAY" PROGRAM, OR VIEWING IT ON TELEVISION, DOES NOT CONSTITUTE A "PRICE" OR "VALUABLE CONSIDERATION", WHICH IS AN ESSENTIAL ELEMENT OF A "LOTTERY"

Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown, in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. The Commission contends that something of value is furnished by the prospective participants because they become part of an invisible audience, which in the aggregate is a thing of value to the station broadcasting the program and
223 to the advertiser who sponsors the program. To the station, because it can sell the program and its audience to an advertiser; to the advertiser, because he can use the program as a vehicle for "commercials" pushing the sale of his merchandise.

We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. It would be a mistake to assume that every one who listens to the program on the radio or views it on television, does so in the hope that he may receive a telephone call to act as a participant and win a prize; but that many may harbor that hope is probably true, otherwise that feature of the program would not be included. If it adds to the value of the program for a sponsor it has a money value to the broadcasting station.

It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. *Griffiths Amusement Co. v. Morgan (Tex.)*, 98 S. W. 2d 844. It is the value to the participant of what he gives that must be weighed. *People v. Cardas (Cal.)*, 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a "legal detriment" to the listener or viewer to sit
224 at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a "price" or "thing of value" paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. *Commonwealth v. Wall (Mass.)*, 3 N. E. 2d 28; *State ex rel Stafford v. Fox Great Falls Theatre Corp. (Mont.)*, 132 P. 2d

689. *People v. Burns*, 304 N. Y. 380. There are cases to the contrary (see footnotes on p. 848 of 54 C. J. S.) but this seems the more reasonable view.

Counsel for the government state that of the decided cases, the one that most closely approaches the factual situation of the "give-away" programs is *Maughs v. Porter*, 161 S. E. 242 (Va. 1931). In that case defendant, an auctioneer, in order to attract a large audience, advertised that everyone who attended the auction sale, whether he bid thereat or not, would be given a chance on an automobile. Plaintiff attended the sale, received a number and her number was drawn as the winner of the automobile. The defendant refused to deliver the car to plaintiff. She sued. The defense of lack of consideration for the promise of defendant was resolved in plaintiff's favor, the court holding that attendance at the sale, which plaintiff was not legally obligated to attend, was a legal consideration. But the court went on to say that it was also a
225 consideration furnished by plaintiff as a participant in a lottery and since a lottery was illegal under the laws of Virginia, the agreement was unenforceable. That case has been criticized in the Law Reviews.⁵

Courts of other states have not followed the *Maughs* case. In *Darlington Theatres v. Coker*, 2 S. E. (2d) 782, the Supreme Court of South Carolina stated that *Maughs v. Porter* was not in accord with "the general current of authority in America." In
226 *State v. Big Chief Corp.*, 13 A (2d) 236, the Supreme Court of Rhode Island held that *Maughs v. Porter* was against the great weight of authority. In *State v. Fox Kansas Theatre Corp.*, 62 P. (2d) 929, the Supreme Court of Kansas referred to *Maughs v. Porter* as representing an "extreme instance of the feature of consideration." And in *People v. Shafer*, 289 N. Y. S. 649, the court considered *Maughs v. Porter* as not controlling and as having been subject to severe criticism. The *Shafer* case was later affirmed by the New York Court of Appeals, 273 N. Y. 475.

⁵ The Virginia Law Review (18 Va. Law Review 465) expressed the view that the general concept of the kind of valuable consideration, as an element of a lottery, was a monetary or a pecuniary consideration. The University of Pennsylvania Law Review (80 U. of Pa. Law Review 744) thought that the Virginia court erred in the *Maughs* case when it held that plaintiff's attendance at the auction was sufficient consideration for the ticket for the drawing of the automobile. In so far as a lottery statute was concerned. The article states: "But it does not follow that a consideration sufficient to support a contract is necessarily the kind of consideration contemplated by the statute prohibiting lotteries." The Harvard Law Review (45 Harvard Law Review 1206), in a note on the type of consideration requisite as an essential element of a lottery, states: "Money, of course, satisfies this requirement. The amount is unimportant; a cent is enough: the money need not even be legal tender. Other property with monetary value serves as consideration, and services would also be adequate. Usually the presence of consideration is obvious." In commenting on the *Maughs* case, a footnote in the article states:—"In any event, the purpose of the lottery laws is to prevent people from giving up money or money's worth in the hope that chance will make their investment profitable, not to forbid them from performing acts having no intrinsic value to anyone. Perhaps the decision can be sustained on the ground that while people did not have to bid at the auction to be eligible to receive the automobile, it was reasonably probable that this would be the case."

A recent case in this Second Circuit (Garden City Chamber of Commerce Inc. et al v. Wagner, 100 F. Supp. 769; 192 F. 2d 240; 104 F. Supp. 235) appears to be very much in point. In that case the defendant, Postmaster of Garden City, refused to allow certain postal cards to be transmitted through the mails on the grounds that they were part of a lottery scheme. The plaintiffs sought an injunction against the Postmaster. In describing the scheme, designated as a treasure hunt, Judge Byers stated that it involved the following steps:

"(a) Each recipient of a card detaches therefrom a removable coupon bearing the same printed number as does the card itself. The sender retains the coupon, and (b) after mailing the card to the Chamber of Commerce, he (c) looks into the shop windows of the storekeepers who participate in the plan. (d) If he sees his number attached to an article displayed in one of those windows, he enters the store, presents his coupon, and receives that article."

227 The Judge then concluded:

"Manifestly this is a joint effort to promote window shopping, which hitherto has not been deemed even faintly illegal or immoral."

Judge Byers further concluded that the Solicitor for the Post Office had "ruled that to be a consideration, which by no common-sense process of reasoning can be so designated," because the Solicitor had mistakenly assumed that the kind of consideration necessary in a lottery case was only what would suffice in an action upon contract.

The Postmaster appealed to the Court of Appeals, Second Circuit, and moved in that court for a stay of Judge Byers' order pending appeal. Judges A. N. Hand, Chase and Clark heard the application. The court held (Judge Clark dissenting) that the Postmaster's motion for a stay should be denied for the reasons stated in Judge Byers' opinion. Judge Clark, in a dissent, viewed the scheme as a lottery. He held in effect that since "the merchants providing the prizes secured the inestimable advertising boon of bringing the potential prize-seeking customers right into their stores, following hard upon diligent examination of the shop window displays to discover the lucky prize numbers"

228 there was sufficient consideration to make this scheme a lottery, and that the treasure hunters participation furnished the requisite consideration.⁶

⁶ The Postmaster's appeal from Judge Byers order was later abandoned, and Judge Byers later ruled that his decision on the plaintiff's original application for an injunction had thus become a final determination of the controversy. 104 F. Supp. 235.

If window shopping by the treasure hunters was not such a "consideration" as would make the treasure hunt scheme a lottery, is listening to the radio or watching a television screen, the type of consideration that would make a give-away program a lottery? If not, then subdivisions 2 to 4 inclusive of paragraph (b) of the Commission's rules go beyond the scope of the lottery statute and are an unlawful exercise of the rule-making power.

The danger of "impoverishment" to the participants and the development in them of a "gambling spirit" have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, *Horner v. United States*, 147 U. S. 449, quotes from decisions and state laws against lotteries, and cites the "pernicious tendencies" which the State laws were designed to prevent. See, also, *Phalen v. Virginia*, 49 U. S. 163 at p. 168. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules. Those programs cannot
229 be classed as a "reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid." (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote No. 2 above.)

In the legal opinions given by the United States Attorney General to the Commission in 1940 the type of program now condemned by the Commission's Rules as a lottery, was held not to be covered by Section 316 of the Federal Communications Act (now § 1304 of the Criminal Code). [See Exhibits E, F, G, H, I and J annexed to the American Broadcasting Company's affidavit herein.] The Commission thereupon sought to have the Congress specifically prohibit this type of program and wrote Senator Wheeler on December 30, 1943. [See Exhibit "D" annexed to the American Broadcasting affidavit.]⁷ The Interstate Commerce Committee of the Senate (of which Senator Wheeler
230 was Chairman) took no action on Chairman Fly's request.

This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission's membership. There are seven members of the Federal Communications Commission. The rules under attack were

⁷ In his letter to Senator Wheeler, Chairman Fly stated: "The problem of money give-away programs is a very troublesome one in broadcasting" * * * "Under the present section 316 of the Communications Act, the Commission has been unable to deal adequately with the problem" * * * "I believe the matter is serious and important enough to warrant action by Congress at this time." The Chairman enclosed a proposed draft of a new Section 316 directed at give-away programs. The Chairman also stated in his letter that: "Under this type of program, listeners are attracted not by the quality of the program but simply by the hope of being awarded a valuable prize simply by listening to a particular program. This is not good broadcasting."

adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3) and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar "give-away" programs, rendered by the Attorney General in 1940, although the Attorney General now appears in support of the Commission's new rules.

These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is not authoritative. *Interstate Commerce Com'n v. Service Trucking Co.*, 186 F. (2d) 400; *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 190 F. (2d) 326. We need not consider

231 as applicable the admonition of Judge Frankfurter in *National Broadcasting Co. v. United States*, 319 U. S. 190 at p. 218, that the courts should hesitate to substitute their own views for those of the Commission in matters peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute (§ 1304) and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts.

CONSTITUTIONAL QUESTIONS

THE FIRST AMENDMENT—FREE SPEECH

Broadcasting and television are entitled to the protection of the First Amendment to the Constitution, guaranteeing freedom of speech and of the press. The amendment has been held to apply to moving pictures, "like newspapers and radio." *United States v. Paramount Pictures*, 334 U. S. 131, 166. But that guarantee does not shield either the individual or the press, or any media for the communication of thought, from the application of criminal laws designed for the protection of the general public. Free speech is not absolute but relative. *Dennis v. United States*, 341 U. S. 494. The Rules of the Commission, in their subject matter (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amendment. In *re Rapier*, 143 U. S. 110; *Horner v. United States*, 143 U. S. 207; *Donaldson v. Reed Magazine*, 333 U. S. 178; *National Broadcasting Co. v.*
232 *United States*, 319 U. S. 190 at p. 227; *Johnston Broadcasting Co. v. Federal Communications Com'n*, 175 F. (2d) 351.

But in so far as some of their provisions [paragraph (b) (2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of "censorship" and to that extent they would be in violation of the First Amendment.

The merits of the "give-away" programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that "we can see nothing of any possible value to society" in these programs, "they are as much entitled to the protection of free speech as the best of literature" or music. *Winters v. New York*, 333 U. S. 507. When the radio or television audiences tire of them, they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the "give-away" programs as lotteries, if as a matter of law they are not.

Plaintiffs assert that the rules, if given effect, would deprive them of their property without due process of law, in contravention of the Fifth Amendment to the Constitution,⁸ and 233 would subject them to punishment for a crime without a jury trial, in violation of the Sixth Amendment and Article III, Section 2, Clause 3 of the Constitution; and that the Rules constitute a Bill of Attainder in violation of Article I, Section 9, Clause 3.

In formulating the rules in question the Federal Communications Commission was motivated by the belief that the "give-away" programs involving radio and television audience participation fell within the prohibitions of Title 18 U. S. C. A. Section 1304. The rules, according to the Commission's report, were intended to give effect to the Congressional intent expressed in Section 1304, to prevent the furtherance of lottery schemes through the use of interstate broadcasting media.

Under the provisions of the Federal Communications Act the broadcasting company would be entitled to a trial and would have a right of review in the courts, including the right to an injunction pendente lite. The provisions of the Federal Communications Act and of the Administrative Procedure Act would have to be followed. That would be a compliance with the due process amendment. *Columbia Broadcasting Co. v. United States*, 316 U. S. 407.

234 The power of the Federal Communications Commission to grant or withhold licenses in the public interest and to

⁸ "AMENDMENT V—CAPITAL CRIMES: DUE PROCESS.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, limb, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

make such rules as will carry out the intendment of the Federal Communications Act, implies a grant of authority to employ the means necessary to discharge the powers conferred. *Stahlman v. Federal Comm. Com'n, C. C. A. (D. C.) 1942, 126 F. (2d) 124*; *Federal Comm. Com'n v. Pottsville Broadcasting Co., 309 U. S. 134*. The means chosen by the Commission to compel compliance with its rules was to deny a license or a renewal license to any applicant whose radio or television activities were found to violate the Commission's Rules. *Communications Commission v. W. O. K. O., 329 U. S. 223*. A finding by the Federal Communications Commission that its rules had been transgressed would not amount to a conviction for a crime (*Mansfield Journal Co. v. Federal Comm. Com'n, C. C. A. (D. C.) 1950, 180 F. 2d 28*) nor would the denial of a license to an applicant be a punishment for a crime. The enforcement of the rules would not violate the Sixth Amendment, or Article III, Section 2, Clause 3, or Article I, Section 9, Clause 3 of the Constitution."

235 The purpose of the Sixth Amendment and of Article III, Section 2, Clause 3, was to assure a defendant, in a criminal prosecution, that he would have a speedy and public trial by an impartial jury in a proper venue with the right of confrontation, the assistance of court process and of counsel. Article I, Section 9, Clause 3, prohibits the passage of any Bill of Attainder, which has been described as a legislative act which inflicts punishment without a judicial trial. *United States v. Lovett, 328 U. S. 303*. Neither of the above amendments nor the specified sections of the Constitution have any application to the facts of these cases.

The parties having stipulated the facts, no findings of fact need be made. The stipulation and defendants' motion concede plaintiffs' allegations of "irreparable injury." Our conclusions of law sufficiently appear in the above opinion and in the relief to be granted in the final judgment.

236

RELIEF GRANTED

Plaintiffs' motions for summary judgment in their favor are granted to this extent, that the Federal Communications Commission will be permanently restrained and enjoined from en-

* AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ART. III—SECTION 2, CLAUSE 3. CRIMINAL TRIAL BY JURY.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ART. I—SECTION 9, CLAUSE 3. BILL OF ATTAINDER AND EX POST FACTO LAWS.

No Bill of Attainder or ex post facto Law shall be passed.

forcing subdivisions (2), (3) and (4) of paragraph (b) of its interpretative rules adopted August 18, 1949, in relation to radio and television give-away programs; and the Commission's order adopting the rules will, to that extent, be vacated and set aside.

As to paragraphs (a) and (b) (1) of the said rules, plaintiffs' motions for summary judgment and an injunction are denied; and the Commission's order, adopting the rules, is upheld in respect to said paragraphs (a) and (b) (1) of the rules.

Defendants' motions to dismiss the amended complaints are denied. Defendants' motions for summary judgment in defendants' favor are granted only in respect to paragraphs (a) and (b) (1) of said rules. Defendants' motion to strike paragraphs 13, 14 and 16 of the National Broadcasting Company's amended complaint is granted.

237 Let a final judgment be settled accordingly, on ten days' notice.

Dated February 5, 1953.

VINCENT L. LEIBELL,
United States District Judge.
EDWARD WEINFELD,
United States District Judge.

238 Before CLARK, Circuit Judge, and LEIBELL and WEINFELD, District Judges.

Clark, Circuit Judge (dissenting)

Judge LEIDELL's masterly analysis of the case shows that the only point of doubt or concern is as to whether "consider-
239 -ation" is given in return for a chance at substantial and valuable prizes or financial awards. Though earnestly argued by the several plaintiffs, the other contentions—some rising to the constitutional level—are unconvincing and I agree with the court in overruling them. But on the one issue which thus proves controlling, I do not feel that my brothers have reached a result which is consistent with law, or, indeed, with reason, and I accordingly dissent.

Before I turn to this, I shall briefly dispose of some underbrush. It seems to me that not only was the Federal Communications Commission justified in tackling this thorny subject, but, indeed, it was its duty to do so and it is to be commended for its efforts at length to have the matter definitely determined. Like the enforcement of all sumptuary or moralistic legislation, there is a natural desire to pass the buck to others; and this may be accentuated where a showing of criminality would be required for the pressing of an indictment. But when the Congress says that "Whoever

broadcasts by means of any radio station for which a license is required by any law of the United States" shall not do certain things under pain of fine and imprisonment, 18 U. S. C. § 1304, the licensing authority must surely take some heed of the mandate and act accordingly if it is not to wink at or impliedly approve the law's violations. So it does seem to me that past actions or refusals to act of other governmental agencies or officers have little bearing on our problem. Suffice it to say that now the Commission and the Department of Justice are loyally and co-operatively engaged in advancing what they—and I—think to be a correct interpretation of law. Against this there obviously can be no estoppel to operate against either the United States of America or any one of its agencies.

Now I turn to the specific issue. It is well to recall the 240 statute, now a part of the Criminal Code, 18 U. S. C. § 1304, formerly a part of the Federal Communications Act, 47 U. S. C. § 316, adopted in June, 1934. Its prohibition is against "the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme." I emphasize two matters: (1) Within the prohibition are not merely lotteries, but gift enterprises and any "similar scheme" offering prizes dependent upon "chance"; (2) the statute does not mention "consideration." I stress the first because there does seem to be a feeling in the case that it concerns "buying" a ticket to the drawing of some grand prize in the good old-fashioned sweepstakes manner. But the statute is much broader, as broad in fact as it could possibly be made for the objectives in view. It is more inclusive, for example, than such a statute as N. Y. Penal Law § 1370 reaching "the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance." So it is not without significance that when Congress in 1950 wished to validate "any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event," it felt it had to do this by specific exemption. 18 U. S. C. § 1305. And the omission of any reference to consideration—unlike the New York statute, for example—carries its own meaning. The federal law contains no technical requirement of consideration as such; whatever is read into the statute must be what will carry out its essential purpose.

Now the essential purpose cannot be oversimplified to debauchery by a single grand lottery, or even several lotteries, as

241 the initial and leading case of *Horner v. United States*,
 147 U. S. 449, is at pains to point out. Rather it is aimed
 at a somewhat less direct road to waste and want: the lack of in-
 dustry and initiative induced by initial success in getting valuable
 returns from the operation of chance. There is also quite specifi-
 cally the unjust enrichment which accrues to the manipulators of
 the scheme. But it is still possible for anyone—advertiser, broad-
 caster, or what not—to make pure gifts; the Commission calls
 attention to the plot of a moving picture of twenty years ago, “If
 I Had A Million,” and says that if “a rich man gives away his
 millions to persons chosen at random, it may be conceded that no
 evil would be done and no violation of the law would be involved.”
 So what we are looking for is really some gain to the promoters of
 the scheme which takes the matter out of the realm of pure
 altruism.

This, of course, greatly simplifies the problem. But I believe
 it makes sense of it, too. To inquire whether the broadcasters and
 their advertising customers are engaged in altruistic operations is
 of course to supply the answer at once. What they are doing is to
 purchase time to advertise and vend their wares—indeed the most
 valuable time conceivable, as is alleged in the papers before us and
 conceded by all.¹⁰ The time spent by a single listener may be quite
 brief. But the time spent by the whole country in hanging for an
 hour more or less breathlessly upon a nationwide broadcast which
 may (but probably will not) yield the listeners returns ranging
 from refrigerators, pianos, and trips to South America to good
 242 hard cash beyond their wildest dreams provides so stupen-
 dous an audience for the advertising message as hardly to be
 estimated. And I suspect that the time spent by any single
 listener is almost always considerable. A few fleeting moments
 will not be adequate to learn what the rules are, hear and guess
 the tune or the answer to the question, and accept and answer the
 fateful telephonic inquiry. One is just impelled to hear the hour
 out, and, having gotten the hang of it, to come back the following
 week, and have the family listen as a part of the game until the
 announcer calls.

My brothers, it seems to me, are drawn away from the natural
 answer by the odd mistake that what is involved as the “price” or
 “valuable consideration” (terms themselves constituting an over-
 precise formulation of the issue, as I have pointed out) is not value
 “to the station or sponsor,” but “It is the value to the participant

¹⁰ Indeed, audiences are already becoming hardened to what were once considered fabulously high give-away bonanzas. See the following item in the N. Y. Times, Dec. 28, 1932, Sunday Radio Section, p. X 11: “Hard Times. A doorman from A. B. C.’s Ritz Theater stood at the corner of Broadway and Forty-eighth Street one morning last week with a handful of tickets. ‘Get your free tickets to “Break the Bank,”’ he yelled, ‘the biggest money-paying show on the air. Offering \$2,900.’ In ten minutes he unloaded just two tickets.”

of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once
243 illegal.¹¹ And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recognized in the well reasoned cases, such as *State v. Wilson*, 109 Vt. 349, 196 A. 757, cited below.

If the issue can thus be made comparatively simple, why has so considerable an amount of concern, if not confusion, developed in the cases? A part of this is undoubtedly occasioned by differences in the governing law; thus cases under the New York statute cited above would hardly be safe authorities under the federal law. But the main reason, I believe, lies elsewhere and, in fact, is not hard to discern. It seems to be found in all cases of attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical. The analogy of the Prohibition Amendment is close. Since the law seems harsh, a search most diligent is made to cut down its more drastic operation; in fact, the mind seems to revolt at enforcement of its harsher elements. That, I think, is the real meaning. If people want to waste their time in listening to radio programs in the hope or off-chance of winning some valuable prizes, why not let

¹¹ The statement "a cent is enough" quoted in the opinion from 45 Harv. L. Rev. 1196, 1206, appears to be borne out by the cases cited: *People v. Runge*, 3 N. Y. Cr. R. 85, 34 Hun 634; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, holding also that not all the participants need pay even the one cent which is currently the consideration; and *Stewart v. State*, 108 Tex. Cr. R. 661, 2 S. W. 2d 440, holding also that the coin need not be current money of recognized value. So, too, services, such as selling a book, are sufficient. *Loveland v. Bode*, 214 Ill. App. 399.

244 them do it. That is a widespread attitude, with which, of course, I have considerable sympathy. But I think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unlikely, prohibition into one which is unintelligible. After all, the fate of the Prohibition Amendment showed the proper eventual remedy.

My brothers do not collect cases, nor shall I. It is a barren task in this problem. For courts and writers have found or created confusion and doubt, and it does little good to catalogue this. Moreover, as stated, many precedents concern differing legal situations. I shall content myself with a few authorities I consider most opposite. First I cite *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242, the case of a lottery found in attendance at a real estate auction sale where an automobile was to be given away to a person present, not only because it is a leading case, but also because of the friends and enemies it has made. Thus it has been approved in the persuasive case, cited earlier, of *State v. Wilson*, 109 Vt. 349, 196 A. 757, holding a theater "bank night" scheme a lottery. Attempts to answer the court's analysis have produced fresh difficulties, forcing one commentator to the extreme, found indeed in several of the opposing cases, of requiring a monetary or a pecuniary consideration, 18 Va. L. Rev. 465, while another, trying to avoid going so far, says that the consideration while present was not "of economic value"—a masterpiece of unreality, particularly as applied here. 80 U. of Pa. L. Rev. 744. Another writer quoted for the "a cent" proposition of note 5 of the opinion concludes some tendentiously critical remarks with this bromidic statement: "Perhaps the decision can be sustained on the ground that while people did not have to bid at the auction to be eligible to receive the auto-

mobile, it was reasonably probable that this would be the case." (!) *Pickett, Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1206 n. 37. The requirement of a pecuniary consideration may perhaps be justified under some statutes. Surely, however, that is nowhere a requisite of the federal Act. Further explanation of the requirement of consideration to distinguish a way a gift is found in such cases as *Affiliated Enterprises v. Waller*, 1 Terry 28, 40 Del. 28, 5 A. 2d 257; *Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107; *State v. Jones*, 44 N. M. 623, 107 P. 2d 324; *Affiliated Enterprises v. Gantz*, 10 Cir., 86 F. 2d 597; *Central State Theatre Corp. v. Patz*, D. C. S. D. Iowa, 11 F. Supp. 566; *State of Kansas ex rel. Beck v. Fox Kansas Theatre Co*, 144 Kan. 687, 62 P. 2d 929, 109 A. L. R. 698, with annotation at 709; *State of Missouri ex rel. McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862, 110 S. W. 2d 705, 113 A. L. R. 1104, with annotation at 1121.

And not without some immediate point are the many decisions upholding F. T. C. orders against the use of lottery devices, such as punch boards, in the distribution of candy. Consolidated Mfg. Co. v. F. T. C., 4 Cir., 199 F. 2d 417, citing cases; Sweets Co. of America v. F. T. C., 2 Cir., 109 F. 2d 296.

The reasoning and the cases cited seem to me rather compelling to sustain the Commission's ruling. Were I more in doubt, I should feel some compunction to uphold the defendants' position out of some deference to the respect due the decisions made by the agencies of government having the prime responsibility. But I do not think resort to that principle necessary. Nor do I find what I should regard as apt authority to the contrary. Perhaps I should make reference to *Garden City Chamber of Commerce v. Wagner*, D. C. E. D. N. Y., 100 F. Supp. 769, 772, for that involved a similar statute, 18 U. S. C. § 1302, covering the use of the mails for lottery. In that case the court said that "the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed." This principle I think cannot be upheld and I understand the plaintiffs herein do not support it. And so further reflection has strengthened my belief in the validity of the position I took in dissent when the case came before us on application for a stay pending appeal, 2 Cir., 192 F. 2d 240. Our consideration was not on the merits, but as the result of a brief hearing on our motion calendar. A motion for a stay of this ingenious scheme of local and neighborhood merchants for Christmas sales was obviously not very appealing; further, it required summary disposition in view of the pressure of time—it was submitted November 13 and decision was filed November 16, 1951; and denial of the stay, carrying the matter beyond the Christmas season, made the question moot for all practical purposes. The case cannot therefore be regarded as a definitive precedent disposing of the issue.

I think it therefore appropriate to reiterate by way of summary that my colleagues suggest no workable dividing line between what is "value" and what is not in deciding what the participants in these give-away schemes have themselves given. On the contrary, they seem to me to have rejected the understandable tests to which persuasive precedents point. I fear, therefore, that our decision will serve to promote more confusion than it allays. For my part I would dismiss the plaintiffs' complaints on the merits.

250 In United States District Court, Southern District
of New York

Civil Action No. 52-24

AMERICAN BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Final Judgment

Filed March 11, 1953

This cause having come on further to be heard on plaintiff's motion for summary judgment and on defendants' motion for an order dismissing the amended complaint or, in the alternative, for summary judgment, and the Court having heard the arguments of counsel, and upon consideration thereof, and the Court having rendered and filed an opinion on February 5, 1953 (one of the judges dissenting with opinion), stating that it was unnecessary to make findings of fact, the facts having been stipulated by the parties for the purposes of this action, and setting forth its conclusions of law and the relief to be granted, it is

Ordered, adjudged and decreed that

(1) plaintiff's motion for summary judgment is granted to the extent that defendants are permanently restrained and enjoined from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of defendant Federal Communications Commission's Rules² adopted August 18, 1949, and

251 (2) the Order of said defendant Federal Communications Commission dated August 18, 1949, to the extent that it adopted subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of said Rules is vacated and set aside;

(3) plaintiff's motion for summary judgment and for an injunction is denied with respect to paragraph (a) and paragraph (b) (1) of said Sections 3.192, 3.292 and 3.656 of said Rules, and

(4) the said Order of said defendant Federal Communications Commission adopting the Rules is sustained with respect to said paragraph (a) and paragraph (b) (1);

(5) defendants' motion to dismiss the amended complaint is denied; and

² See Appendix annexed hereto.

(6) defendants' motion for summary judgment is granted only with respect to paragraph (a) and paragraph (b) (1) of Sections 3.192, 3.292 and 3.656 of said Rules and is in all other respects denied.

At New York, New York, in said District, on March 10, 1953.

EDWARD WEINFELD,

United States District Judge.

VINCENT L. LEIBELL,

United States District Judge.

CHARLES E. CLARK,

United States Circuit Judge.

Judgment entered Mar. 11, 1953.

WILLIAM V. CONNELL,

Clerk.

252

APPENDIX

The following is the text of §§ 3.192, 3.292 and 3.656.¹³

LOTTERIES AND GIVE-AWAY PROGRAMS.—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. sec. 1304.)

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) Such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

¹³ By its Sixth Report and Order adopted on April 11, 1952, in Dockets No. 8736 et al., the Commission renumbered Section 3.692 as Section 3.656.

(2) Such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) Such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) Such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or
 253 writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

259 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Civil Action No. 52-24

Order allowing appeal

(Filed May 8, 1953)

The Federal Communications Commission, defendant herein, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the order of this Court in this cause entered on March 11, 1953, in so far as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.191, 3.291 and 3.656 of its Rules and Regulations adopted August 18, 1949, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now therefore, it is hereby ordered that said appeal be and the same hereby is allowed as prayed for and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court.

It is further ordered that citation shall issue in accordance with law.

CHARLES E. CLARK,
*Judge of the United States Court of Appeals
for the Second Circuit.*

VINCENT L. LEIBELL,
Judge of the United States District Court.

EDWARD WEINFELD,
Judge of the United States District Court.

H. A. C.

Dated May 8th, 1953.

262

In United States District Court

[Title omitted.]

Civil Action No. 52-24

Assignment of errors and prayer for reversal

(Filed May 8, 1953)

The Federal Communications Commission, defendant in the above-entitled cause, in connection with its appeal to the Supreme Court of the United States, does hereby file the following assignment of errors upon which it will rely in its prosecution of said appeal from the order of the statutory three-judge United States District Court for the Southern District of New York, entered on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949.

Said Court erred:

1. In holding that subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Rules and Regulations of the Federal Communications Commission adopted in its Report and Order of August 18, 1949 go beyond, and constitute an incorrect interpretation of, Section 1304, Title 18, United States Code and are unlawful exercise of the rule making power.

263 2. In granting plaintiff's motion for summary judgment in part by permanently enjoining the Federal Communications Commission from enforcing said subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations and, to that extent, vacating and setting aside the Commission's order adopting said Rules.

3. In denying defendants' motion to dismiss the amended complaint or, in the alternative, for summary judgment in favor of defendants, to the extent that the Court did so in denying the motion to dismiss the amended complaint and in granting defendants' motion for summary judgment in defendants' favor only in respect to paragraphs (a) and (b) (1) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations.

Wherefore, defendant, Federal Communications Commission, prays that the order entered herein on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949, be reversed, and that such other and further relief be granted as to the Court may seem just and proper.

Dated: May 8, 1953.

Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,

J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,
Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,

Attorneys for Federal Communications Commission.

266 In United States District Court

Civil Action No. 52-24

[Title omitted.]

[File endorsement omitted.]

Order permitting transmission of original documents

(Filed May 25, 1953)

In accordance with the provisions of the praecipe herein, and pursuant to the motion to transmit certain original documents

on the appeal of the above-entitled cause to the Supreme Court of the United States, and upon the annexed consent by the attorneys for the plaintiff, it is

Ordered, that the original of all documents, transcripts, exhibits or other parts of this Court records in the above-entitled cause, of which there are no copies on file, may all be forwarded in lieu of copies of such documents to the Clerk of the Supreme Court of the United States as part of the transcript of the record on the appeal herein.

CHARLES E. CLARK,
*Judge of the United States Court
of Appeals for the Second Circuit.*

VINCENT L. LEIBELL,
*Judge of the United
States District Court.*

EDWARD WEINFELD,
*Judge of the United
States District Court.*

Dated: May 21st, 1953.

273 In United States District Court

Civil Action No. 52-24

[Title omitted.]

[File endorsement omitted.]

Praeipce

(Filed May 8, 1953)

*To the Clerk of the United States District Court for the Southern
District of New York:*

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court, and include in said transcript the following:

1. Complaint and exhibits thereto, filed by American Broadcasting Company, Inc., filed on August 31, 1949.
2. Affidavit of James M. Cecil, sworn to September 13, 1949.
3. Affidavit of Ray Vir Den. sworn to September 13, 1949.
4. Affidavit of Joseph A. McDonald, sworn to September 15, 1949, and exhibits thereto.
5. Affidavit of Mark Woods, sworn to September 15, 1949.
6. Order to show cause signed by Judge Simon H. Rifkind, dated September 15, 1949.
7. Temporary restraining order, entered September 23, 1949.

8. Notice of Clerk of Court advising that motion for interlocutory injunction was designated for hearing on October 27, 1949, dated October 17, 1949.

9. Stipulation postponing hearing on motion for interlocutory injunction, dated October 17, 1949, and filed October 24, 1949.

10. Answer of the United States of America and the Federal Communications Commission, and affidavit of service.

11. Stipulation for filing of amended complaint, together with amended complaint and exhibits thereto, filed September 22, 1952.

274 12. Letter to Judge Vincent L. Leibell from Alfred McCormack, dated October 14, 1952.

13. Affidavit of G. B. Zorbaugh, sworn to September 19, 1952, and exhibits thereto.

14. Notice of Motion for summary judgment on behalf of American Broadcasting Company, Inc., dated September 22, 1952.

15. Notice of Motion and motion to dismiss complaint, or for summary judgment in favor of United States of America and Federal Communications Commission, together with supporting affidavit of Benedict P. Cottone and exhibits thereto, filed September 22, 1952.

16. Order convening three-judge court, entered October 30, 1952.

17. Briefs submitted to the District Court on behalf of American Broadcasting Company, Inc., and defendants United States of America and Federal Communications Commission.

18. Letter dated December 16, 1952, from George B. Turner to Judge Charles E. Clark, and enclosure.

19. Opinions of District Court, dated February 5, 1953.

20. Final Judgment of District Court, entered March 11, 1953.

21. Petition for appeal.

22. Assignment of errors and prayer for reversal.

23. Statement as to jurisdiction.

24. Order allowing appeal.

25. Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States.

26. Order permitting transmission of original documents.

27. Citation on appeal.

28. Admission of service of papers on appeal.

29. The praecipe with acknowledgement of service and waiver.

30. Clerk's certificate.

Said transcript is to be prepared as required by law and the Rules of this Court and Rules of the Supreme Court of

275 the United States, and is to be filed in the Office of the Clerk of the Supreme Court.

Dated: May 8, 1953.

Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,

J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,

Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,

Attorneys for the Federal Communications Commission.

278 In United States District Court

Civil Action No. 52-37

[File endorsement omitted.]

NATIONAL BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Stipulation for filing amended complaint

(Filed September 17, 1952)

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel as follows:

1. Defendants consent to the filing by plaintiff of an amended complaint in substantially the form annexed hereto (without exhibits) and marked "Exhibit A," such amended complaint as filed to have annexed thereto the exhibits recited therein. Such amended complaint together with the exhibits thereto is herein-after referred to as the Amended Complaint.

2. It appearing that each of the parties intends to make a motion for summary judgment in this action, for the purpose of such motions

(a) all allegations of fact set forth in the Amended Complaint shall be taken as admitted by the defendants, and

(b) either plaintiff or defendants may rely on allegations of fact contained in the complaints or amended complaints in the companion actions now pending in this Court entitled, respec-

tively, American Broadcasting Company, Inc., plaintiff, against United States of America and The Federal Communications Commission, defendants, Civil Action No. 52-24, and 279 Columbia Broadcasting System, Inc., plaintiff, vs. United States of America and The Federal Communications Commission, defendants, Civil Action No. 52-58, and on the stipulations and affidavits, or any of them, filed in either of said companion actions, in each case to the same extent as if such complaints, stipulations and affidavits had been filed in this action.

Dated: New York, N. Y., Sept. 16, 1952.

CAHILL, GORDON, ZACHRY & REINDEL,
Attorneys for Plaintiff.

WILLIAM J. HICKEY,
*Attorneys for Defendant,
United States of America.*

MYLES J. LANE,
*United States Attorney for the
Southern District of New York.*

DANIEL R. OHLBAUM,
*Attorney for Defendant,
Federal Communications Commission.*

So ordered: Sept. 16, 1952.

SYLVESTER J. RYAN,
U. S. D. J.
H. A. C.

280 In United States District Court
Civil Action No. 52-37

[Title omitted.]

[File endorsement omitted.]

Amended complaint

(Filed September 22, 1952)

Plaintiff for its amended complaint herein alleges:

1. This action is brought pursuant to the provisions of the Communications Act of 1934, as amended (48 Stat. 1064, 1093 and 63 Stat. 108; 47 U. S. C. § 402 (a)) and of Title 28, United States Code (28 U. S. C. §§ 1336, 1398, 2484, 2321-25), and Section 10 of the Administrative Procedure Act (60 Stat. 243; 5 U. S. C. § 1009), to set aside, annul, suspend and permanently enjoin the enforcement of an order of the Federal Communications Commission issued August 18, 1949, in proceedings entitled "In the Matter of Promulgation of Rules Governing Broadcast of Lottery Infor-

mation, Federal Communications Commission, Docket No. 9113" (said order together with the accompanying report being hereinafter sometimes together called the "Order").

2. The Order adopts and promulgates rules designated therein as §§ 3.192, 3.292 and 3.692 (hereinafter sometimes called the "Rules"). The effective date specified in the Order is October 1, 1949. The enforcement of the Rules and the Order has
281 been stayed by an order of this Court, entered by Judge

Simon H. Rifkind, on September 23, 1949, pending determination of an application by plaintiff for an interlocutory injunction. On September 21, 1949, the Federal Communications Commission adopted and issued an additional order postponing the effective date of the Rules and Order here involved until at least 30 days after a final decision by the Supreme Court of the United States in this and other pending litigation with respect to such Rules and Order, or 30 days after the time within which an appeal to the Supreme Court may be taken in such litigation has expired without such an appeal being taken.

3. National Broadcasting Company, Inc. (hereinafter called "NBC"), is a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the City of New York, State of New York, and in the Southern District thereof.

4. The Federal Communications Commission (hereinafter called the "Commission") is an administrative tribunal created by the Communications Act of 1934, as amended (48 Stat. 1064; 47 U. S. C. § 151 et seq.), (hereinafter called the "Communications Act"), and is charged with the execution and enforcement of the provisions of the Communications Act.

5. The United States of America is made a defendant in this suit pursuant to the provisions of the Act of June 25, 1948 (62 Stat. 969; 28 U. S. C. § 2322), and said Communications Act of 1934 (48 Stat. 1064, 1093 and 63 Stat. 108; 47 U. S. C. § 402 (a)).

6. NBC is engaged in sound and television broadcasting and in
282 sound and television network broadcasting in interstate and foreign commerce and is subject to the provisions of the Communications Act. NBC owns and, pursuant to licenses granted by the Commission, operates 5 amplitude modulation or standard broadcast stations, 5 frequency modulation broadcast stations and 5 television broadcast stations. In addition, it furnishes network programs to approximately 187 amplitude modulation broadcast stations and 59 television broadcast stations in the United States, such stations being commonly known as affiliated stations.

7. The Commission, on August 5, 1948, released a Notice of Proposed Rule-Making, in proceedings entitled "In the Matter of

Promulgation of Rules Governing Broadcast of Lottery Information," Docket No. 9113 (13 Fed. Reg. 4748), in which it announced its intention to adopt certain rules. On August 27, 1948, the Commission released a Supplemental Notice of Proposed Rule-Making (13 Fed. Reg. 5075), modifying the statutory basis alleged for its jurisdiction. Copies of said notices are attached hereto, marked "Exhibits A-1 and A-2," respectively, and are made a part hereof.

8. Pursuant to said notices, NBC and others submitted statements and briefs and participated in oral argument before the Commission on October 19, 1948. The Commission did not present any arguments or adduce any evidence at the oral argument in support of its proposed rules.

9. On August 18, 1949, the Commission, acting by four (one dissenting) of its seven members, issued a Report and Order (hereinafter called the "Order") adopting, effective October 1, 1949, the rules set out therein. A copy of said Order is attached hereto, marked "Exhibit B," and made a part hereof.

10. By the terms and provisions of the Order, the Commission promulgated the following rules:

283 "LOTTERIES AND GIVE-AWAY PROGRAMS.—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304.)

"(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner, or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

284 11. The Order applies to NBC in the conduct of its network business as well as in its business as licensee and operator of broadcast stations. NBC now broadcasts, and has scheduled for broadcast in the future, programs which either clearly fall within the terms of the Order or may fall within the terms of the Order if the Order is broadly construed. Such programs are broadcast by NBC over the stations owned and operated by it and over the NBC sound broadcasting and NBC television networks. Certain of these programs have audiences of many millions, and have achieved such a large measure of public approval and popularity as to be of great value to NBC. Time charges on an annual basis for the three programs described in paragraphs 13, 15 and 16 hereof alone are currently in excess of \$5,000,000.

12. Certain typical programs among those currently being broadcast or formerly broadcast by NBC which it is believed may be considered by the Commission to fall within the terms of the Order are described in paragraphs 13 to 16 hereof. The description of each such program is based upon a recent format and status of such program. Since program formats vary from time to time it is possible that individual broadcasts of such programs may fall within the terms of the Order and other broadcasts may not.

13. "You Bet Your Life" is a studio audience participation program. There is no admission fee to the broadcast. Every Wednesday from 9-9:30 p. m. (New York time) a radio version is broadcast over 177 stations of the NBC sound network, and 3 non-network stations, and a recorded radio repeat is broadcast from 12

midnight to 12:30 a. m. (New York time) over 14 stations of the

NBC sound network located on the Pacific Coast. Every

285 Thursday from 8-8:30 p. m. (New York time) a television

version is broadcast over 37 stations of the NBC television

network, and a kinescope recording is broadcast over an additional

26 stations of the NBC television networks at varying hours. The

gross time charge to the sponsors is approximately \$15,600 for

the sound broadcast and \$30,100 for the television broadcast each

week. Prior to the broadcast the master of ceremonies selects

from the studio audience a number of individuals whom he expects

to be the most able and interesting contestants and groups them

in teams of two. Each team is permitted to choose a category of

questions to be asked them from several categories submitted to

them. Each category contains four questions. The team is sup-

plied with \$20 before the first question is asked. They may bet

any part or all of this amount on their ability to answer the first

question correctly. If they succeed, the amount which they bet

is added to the \$20; if they fail, such amount is subtracted from

the \$20. The process is repeated for each of the remaining three

questions. If, in the course of such questions, a team loses the

entire \$20, they are given the opportunity to answer correctly a

simple question for \$25 and are then retired without any further

opportunity to bet. The team which completes its category with

the most money is given the opportunity to answer the jackpot

question at the end of the program. If two or more teams have

won an identical sum which is the largest amount won, such teams

compete for the jackpot. The jackpot commences at \$1,000 and

an amount of \$500 is added each week that the jackpot question

is not answered correctly. A new jackpot question is asked each

week. In addition, an amount of \$100 is paid to that team either

member of which mentions, in the course of their participa-

286 tion in the program a secret word which was selected before

the broadcast and announced to the studio and listening

audiences and as to which a clue is given to the teams. Such

amount cannot be used for betting nor is it used in computing the

amount won by a team to determine their eligibility for the jack-

pot question. A transcript of the radio broadcast of this program

which occurred on April 4, 1951, is attached hereto, marked Ex-

hibit C, and made a part hereof.

14. "The \$64 Question" is a studio audience participation pro-

gram broadcast for many years by NBC but which is not currently

being broadcast. NBC considers that it may desire to resume

broadcasting this program in the future. The following descrip-

tion is of the format of the program as broadcast in April, 1952.

There was no admission fee to the broadcast. The program was

broadcast every Sunday from 9:30-10 p. m. (New York time) over 141 stations of the NBC sound network. Although it had been commercially sponsored for many years under its present title and under its former title "Take It or Leave It," it was being broadcast on a sustaining basis. Prior to each broadcast the master of ceremonies selected from the studio audience a number of persons whom he expected to be the most able and interesting contestants. Each contestant in his turn, was permitted to select one of several categories of questions submitted to him. The contestant was then asked a series of seven questions from the category chosen. A correct answer to the first question won a prize of \$1 and the prize doubled in value for each succeeding question correctly answered, up to \$64 for correct answers to all seven questions. A contestant might elect to stop after any correct answer and collect the amount won to that point. If a contestant answered any questions incorrectly, he lost the amount theretofore won and was retired, and an amount equal to the value

of the question incorrectly answered was added to the jackpot. All contestants competed for the jackpot question at the end of the program. A new jackpot question was asked each week. The jackpot began at \$64, to which was added amounts as aforesaid. If the jackpot was not won on any given program, it was carried over in full from program to program. A transcript of the broadcast of this program which occurred on April 1, 1951 is attached hereto, marked "Exhibit D," and made a part hereof.

15. "The Paul Winchell-Jerry Mahoney Show" playing "What's My Name," involves participation by both the studio and listening audiences. There is no admission fee to the broadcast. The program is broadcast every Monday from 8-8:30 p. m. (New York time) over 35 stations of the NBC television network and a kinescope reproduction is broadcast over an additional 19 stations of the NBC television network at varying hours. The gross time charge to the sponsor is approximately \$26,800 each week. Prior to the broadcast the master of ceremonies selects from the studio audience a number of participants, each of whom is asked to identify a person from clues given by the master of ceremonies and from a scene depicted by professional performers. Each participant receives a gift of the sponsor's merchandise and, if he correctly identifies the person, a \$100 United States Savings Bond. If he fails to identify such person, he receives a \$25 bond and a \$100 bond is added to the jackpot. The jackpot starts at \$500 in bonds and if not won on any given program is carried over in full from program to program. Opportunity to win the jackpot is available only to the listening audience. Listeners who wish to

participate send in postcards bearing their names, addresses, telephone numbers and call-letters of the stations to which they are listening. Each week several of these postcards are selected at random and telephone calls made to the individuals named thereon in the order of their selection. No other use is made of
 288 the postcards. The first individual called who answers the telephone receives a gift of the sponsor's merchandise and is given the opportunity to win the jackpot by identifying a person from clues given by the master of ceremonies and from a scene depicted by professional performers. If he fails, the jackpot is carried over in full, together with an additional \$500 in bonds, to the following program. The subject of the jackpot question is changed each week. A transcript of the broadcast of this program which occurred on March 12, 1951, is attached hereto, marked "Exhibit E," and made a part hereof.

16. "Double or Nothing" is a program in which the primary participation is by members of the studio audience. There is no admission fee to the broadcast. The program is broadcast every Monday through Friday from 10:30-11 a. m. (New York time) over 129 stations of the NBC sound radio network and the programs are repeated over 36 additional NBC sound radio network stations at varying hours. The gross time charge to the sponsor is approximately \$36,200. Prior to the broadcast the master of ceremonies interviews a number of persons in the studio audience and selects those whom he expects to be the most able and interesting contestants. Each contestant is permitted to choose one of several categories of questions submitted to him. Before commencing the questions in the category selected, the master of ceremonies asks of each contestant a question calling for the contestant to make an estimate. The contestant whose estimate is closest to the correct answer wins a prize of \$80. After such question, the contestant is asked a series of four questions from the category selected by him. A correct answer to the first question wins a
 prize of \$2 and the prize increases to \$10 for correct answers
 289 to all four questions. Up to this point the contestant may elect to stop after any correct answer and collect the amount won. If the \$10 question has been correctly answered the contestant is given the opportunity to increase his winnings to \$20 and then to \$40 by correctly answering the two following questions. If either of such questions is incorrectly answered, the contestant loses the amount theretofore won by him and such amount is added to the jackpot which starts at \$100. At the close of the program all contestants participate in the jackpot question. Members of the listening audience are invited to submit questions on a label of one of the sponsor's products. One such question is selected each day and the person submitting such question receives

one-half of the jackpot for that day. The contestant who answers the jackpot question correctly receives the other half of the jackpot. If none of the participants is able to answer the jackpot question correctly, the one-half of the jackpot reserved for the contestants is added to the jackpot for the next succeeding program. A transcript of the broadcast of this program occurring on April 3, 1951, is attached hereto, marked "Exhibit F," and made a part hereof.

17. On information and belief, none of the programs described in paragraphs 13 to 16, and no similar program broadcast by NBC have ever been held by any court to be in violation of Section 1304 of the United States Criminal Code, or of any state lottery statute, and no criminal proceedings have ever been brought against any person or corporation on the ground that any such program violated any criminal statute.

18. The Commission did not have before it in the record on which it acted any evidence that these or any similar programs were contrary to or adversely affected the public interest, or that the broadcast licensees broadcasting such programs were of bad character or otherwise unfit to hold such licenses. The Commission made no finding that any of the programs coming within the terms of the Order was contrary to or adversely affected the public interest except in so far as they may violate Section 1304 of the United States Criminal Code.

19. Under the provisions of the Communications Act, no radio or television stations may operate without a license issued by the Commission. Licenses are granted by the Commission for a term of three years for standard and frequency modulation stations and one year for television stations. The licenses of all radio and television stations owned and operated by or affiliated with NBC will expire within less than three years from the date hereof. The stations owned and operated by NBC have a value of many millions of dollars which will be destroyed if its licenses therefor are not renewed. The stations affiliated with NBC also have a value of many millions of dollars which will be destroyed if their licenses are not renewed.

20. On information and belief, if the Order is not enjoined and is enforced in accordance with its terms, unless NBC ceases to broadcast programs which violate it, the Commission will thereafter deny all applications made by NBC or its affiliated stations carrying such programs, for construction permits, licenses, renewal of licenses, or any other authorizations for the operation of sound or television broadcast stations. In addition, the Commission has the power to revoke, and might in such circumstances, revoke, licenses of such stations prior to their expiration.

21. NBC's principal source of revenue in the conduct of its business is the sale of broadcast time to advertisers. Gross revenue from time sales is divided by NBC with the stations affiliated with it in accordance with the terms of its affiliation contracts. In some instances the programs broadcast in the purchased time periods are supplied by the advertiser at its own expense, and in other instances they are supplied by NBC, in which case NBC makes an additional charge for the program. The program described in paragraph 13 hereof is and that described in paragraph 14 was supplied by NBC, which has made a substantial investment therein. The programs described in paragraphs 15 and 16 hereof are not supplied by NBC, and the sponsors thereof expend considerable sums weekly for such program in addition to the amounts paid to NBC.

22. If NBC should cease to broadcast all programs which would appear to fall within the terms of the Order, the listening audience now commanded by such programs may be lost and revenues of NBC from the sale of time will diminish.

23. On information and belief, there is no procedure whereby a broadcast licensee or any other person interested in broadcasting a given program can obtain from the Commission a ruling in advance of the broadcast as to whether the program is in the Commission's opinion in violation of the Order.

24. If the Order is not enjoined, NBC, because of its inability to obtain advance rulings, will be able to protect itself from the loss of its licenses only by ceasing to broadcast not only programs which are within the terms of the Order but also any programs which might in the future possibly be deemed by the Commission to come within the Order, even if NBC in good faith considers that such a construction of the Order would be incorrect.

25. The necessary effect of the Order upon NBC if it is enforced will be such as to render less valuable the conduct of NBC's business.

26. NBC will suffer substantial and irreparable injury if enforcement of the Order is not permanently enjoined.

27. Plaintiff alleges that each and every paragraph of the Order is void and beyond the power, authority and jurisdiction of the Commission to impose, for each of the following reasons:

(a) The Commission is without power, authority or jurisdiction to promulgate rules and regulations interpreting or purporting to interpret Section 1304 of the Criminal Code;

(b) The Commission is without power, authority or jurisdiction to promulgate rules and regulations or to use its licensing powers, directly or indirectly, so as

(I) to impose or threaten to impose sanctions or penalties for conduct allegedly in violation of Section 1304 of the Criminal Code, but not adjudicated as such by any court; or

(II) to impose or threaten to impose sanctions different from or in excess of those expressly provided by Congress for violations of Section 1304 of the Criminal Code;

(c) The Commission is without power, authority or jurisdiction to adopt or, in exercising its licensing functions to apply:

(I) Rules pursuant to which application for authorization for the operation of broadcasting stations are automatically to be denied on the sole basis of a violation of Section 1304 of the Criminal Code;

(II) Rules pursuant to which applications for authorization for the operation of broadcasting stations are automatically to be denied on the sole basis of an unadjudicated violation of Section 1304 of the Criminal Code;

293 (III) Rules pursuant to which applications for authorization for the operation of broadcasting stations are automatically to be denied on the sole basis of a violation of the Commission's interpretation of Section 1304 of the Criminal Code;

(d) The Order and Rules adopted by the Commission as a matter of law incorrectly interpret and apply Section 1304 of the Criminal Code;

(e) The Order and Rules are arbitrary, capricious and contrary to the public interest;

(f) The Order and Rules are an abuse of the discretionary power vested in the Commission by the Communications Act;

(g) The Commission entered the Order upon the basis of considerations and standards not fixed or prescribed by the Communications Act of 1934 and upon which the Commission has no power, authority or jurisdiction to pass;

(h) The Order and Rules are contrary to Section 326 of the Communications Act of 1934 as amended;

(i) The Order and Rules are in violation of Sections 4 (b), 5 (a), (b), (c), 7 (a), (c), (d), 8 (a), (b) and 9 (a) of the Administrative Procedure Act; (60 Stat. 237, 5 U. S. C., Section 1001, et seq.)

(j) The Commission has usurped the power of Congress, if any there be, to determine the contents of radio and television programs and what sanctions and other penalties shall be imposed for violations of a statute;

(k) The Order and Rules, if authorized by any provision of the Communications Act of 1934, violate the First Amendment to the Constitution of the United States;

294 (1) The Order and Rules, if authorized by any provision of the Communications Act of 1934, deprive the plaintiff of property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States;

(m) The Order and Rules constitute, or have the form and effect of a bill of attainder, contrary to Clause 3 of Section 9 of Article 1 of the Constitution of the United States;

(n) The Order and Rules, if authorized by any provisions of the Communications Act of 1934, subject plaintiff to punishment without a hearing by any court in violation of Article III of the Constitution of the United States;

(o) The Order and Rules, if authorized by any provision of the Communications Act of 1934, deprive plaintiff of the right to a trial by jury in a criminal prosecution in violation of the Sixth Amendment to the Constitution of the United States.

28. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays:

1. That a court of three judges constituted as required by Title 28, United States Code (28 U. S. C. §§ 2284, 2325) be convened, hear and determine this action.

2. That said Court grant an interlocutory injunction restraining and enjoining, pending final hearing and determination herein, the enforcement, operation or execution of the Order in whole or in part.

3. That, after final hearing, said Court adjudge, order and decree that the Order is, and has at all times been, beyond the lawful authority of the Commission, in violation of the
295 legal rights of plaintiff, and is wholly void, arbitrary and unreasonable, and that the Order be perpetually vacated, set aside, suspended and annulled and the enforcement thereof perpetually restrained and enjoined.

4. That plaintiff may have such other and further relief in the premises as may be deemed by this Court to be just and equitable.

CAHILL, GORDON, ZACHRY
& REINDEL,

By JOHN W. NIELDS,

A Member of the Firm,

Attorneys for Plaintiff, National Broadcasting Company, Inc. Office and Post Office Address: 63 Wall Street, City, County, and State of New York.

Date: New York, N. Y., September 22, 1952.

Exhibit A-1 to amended complaint

FEDERAL COMMUNICATIONS COMMISSION

[47 CFR, Part 3]

[Docket No. 9113]

BROADCASTING OF INFORMATION CONCERNING LOTTERIES, GIFT
ENTERPRISES OR SIMILAR SCHEMES

Notice of Proposed Rule Making

In the matter of promulgation of rules governing programs prohibited by section 316 of the Communications Act as broadcasting of information concerning lotteries, gift enterprises or similar schemes.

1. Notice is hereby given of proposed rule making in the above-entitled matter.

2. The Commission proposes to issue new rules, set forth below, to be designated as §§ 3.192, 3.292 and 3.692. These rules would set forth with particularity for standard FM and television broadcasting, certain types of programs which the Commission believes are in violation of section 316 of the Communications Act of 1934, as amended, which prohibits the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." The rules are intended to afford broadcast licensees with as specific advance information as is possible as to the various types of programs which the Commission considers are in violation of the section of the act.

3. It should be pointed out that, as specified in the proposed rules themselves, no one rule or set of rules can cover the almost infinite number of varieties of program formats bordering on illegal lotteries or gift enterprises, and the determination as to whether a particular program violates section 316 will necessarily depend on the facts of the particular case. However, it is believed that the proposed rule will be of aid and assistance to licensees in determining whether a given program falls within the type of program specified by the proposed rules as a lottery, gift enterprise or similar scheme.

4. The proposed rules are issued under the authority of sections 316, 4 (i) and 303 (r) of the Communications Act of 1934, as amended.

5. Any interested party who is of the opinion that the proposed rules should not be adopted, or should not be adopted in the man-

ner set forth below, may file with the Commission on or before September 10, 1948 a statement or brief setting forth his comments. At the same time persons favoring the rules as proposed may file statements in support thereof. The Commission will consider all such comments that are presented before taking action in the matter, and if any comments are submitted which appear to warrant the holding of a hearing or oral argument, notice of the time and place of such hearing or oral argument will be given.

6. In accordance with the provisions of § 1.764 of the Commission's rules and regulations, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission.

Released: August 5, 1948.

[SEAL] FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

§ 3.192 PROGRAMS COVERED BY SECTION 316 OF THE COMMUNICATIONS ACT.—(a) Section 316 of the Communications Act of 1934 provides in part that no radio station "shall knowingly permit the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift, enterprise, or scheme, whether said list contains any part or all of such prizes".

(b) The determination as to whether a particular program violates the provisions of section 316 of the Communications Act of 1934 depends on the facts of each case. However, the Commission will in any event consider that a program is in violation of section 316 if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in any manner upon lot or chance, if as a condition of winning such prize:

(1) Such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) Such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) Such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous pro-

gram will be considered as an aid in answering the question correctly; or

(4) Such winner or winners are required to answer the phone or write a letter if the phone conversation or contents of the letter (or the substance thereof) are broadcast by the station.

298 Sections 3.292 and 3.692 proposed to be issued with respect to FM and Television broadcasting would read exactly the same as § 3.192.

[F. R. Doc. 48-7366; Filed, Aug. 16, 1948; 9:00 a. m.]

299 *Exhibit A-2 to amended complaint*

FEDERAL COMMUNICATIONS COMMISSION

[47 CFR, Part 3]

[Docket No. 9113]

BROADCASTING OF INFORMATION CONCERNING LOTTERIES, GIFT ENTERPRISES OR SIMILAR SCHEMES

Supplemental Notice of Proposed Rule Making

1. Supplemental notice is hereby given of proposed rule making with respect to the broadcasting of lottery information. On August 5, 1948, the Commission released a notice of proposed rule making with respect to this matter.

2. On June 25, 1948 by Public Law 772, 80th Congress 2d Session, section 316 was removed from the Communications Act of 1934 and recodified effective September 1, 1948 as section 1304 of the United States Criminal Code, 18 U. S. C. section 1304. This change was part of a general revision of laws relating to federal crimes which included among its purposes, the recodification of the Criminal Code and of criminal provisions not already in that code which could be transferred from other titles without injury to their text. No substantive change in the applicable law with respect to the broadcast of lottery programs was apparently contemplated by the recodification. See 93 Congressional Record, pp. 5048-5049; H. Rep. No. 304, 80th Cong. 2d Sess., p. A-99 (Reviser's notes). Accordingly, the Congress has reaffirmed the public policy embodied in section 316 of the Communications Act and has renewed the determination that it is contrary to the public interest to permit the broadcasting of lottery programs over the air.

3. This Commission is authorized to and has the duty to consider in connection with its general licensing authority policies affecting radio expressed in other acts of Congress. See *McLean Trucking Company v. United States*, 326 U. S. 67; *Southern Steamship Company v. NLRB*, 316 U. S. 31. It has authority,

therefore, in determining whether a grant of a given license application would serve the public interest, convenience or necessity, to consider the Congressional mandate that no licensee should broadcast any program containing any advertisement or information concerning any lottery, gift enterprise or similar scheme. And in so doing the Commission is not required to await prior judicial determination that a given program is in violation of section 1304 of the Criminal Code. *Public Clearing House v. Coyne*, 194 U. S. 497; *Southern Steamship Company v. NLRB*, 316 U. S. 31. And the Commission is authorized to issue general rules setting forth for the information of licensees its intention to refuse licenses to persons operating in violation of the Congressional prohibition against the broadcast of lottery information set forth in section 1304 of the Criminal Code. See *National Broadcasting Company v. United States*, 319 U. S. 190.

4. Accordingly, the Commission proposes to adhere to its determination of August 5, 1948 that rules with
300 respect to the broadcasting of lottery information should be promulgated by this Commission. Notice is hereby given that rules, similar in form to the Chain Broadcasting regulations, §§ 3.101-3.108 of the rules dealing with the qualifications of licensees, are proposed to be promulgated. These proposed rules are designed to assist the Commission, licensees, and other interested persons in giving effect to the public policy embodied in the determination of Congress that the United States should not "permit any radio station licensed and regulated by the government to engage in such unlawful practices." Senate Report 1045 on H. R. 7716, 72d Congress, 2d Session.

5. The proposed rules would also set forth with particularity, as set out in the Appendix of the notice of proposed rule making issued August 5, 1948 for standard, FM and television broadcasting, certain types of programs which the Commission believes are clearly prohibited by section 316 of the Communications Act of 1934 as amended (effective September 1, 1948, section 1304 of the U. S. Criminal Code, 18 U. S. C.) which makes criminal the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." These specifications of various types of programs which the Commission will consider to be lotteries, gift enterprises or similar schemes in violation of law, are intended to afford broadcast licensees an opportunity to be informed, so far as it is possible to do so, of the interpretation of the law with respect to these matters which the Commission proposes to apply in the exercise of its licensing functions. These proposed rules therefore are entirely interpretative in nature and do not purport to add to or detract from the statutory prohibition imposed by Congress.

6. The proposed rules are issued under the authority of sections 4 (i) and 303 (r), 307 (a), 308 (b) and 309 (a) of the Communications Act of 1934, as amended.

7. Any interested party who is of the opinion that the proposed rules should not be adopted or should not be adopted in the manner proposed may file with the Commission on or before September 10, 1948, a statement or brief setting forth his comments. At the same time persons favoring the rules as proposed may file statements in support thereof. The Commission will consider all such comments that are presented before taking action in the matter, and if any comments are submitted which appear to warrant the holding of a hearing or oral argument, notice of the time and place of such hearing or oral argument will be given.

8. In accordance with the provisions of § 1.764 of the Commission's rules and regulations, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission:

301 Adopted: August 26, 1948.

Released: August 27, 1948.

[SEAL] FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

[F. R. Doc. 48-7805; Filed, Aug. 31, 1948; 8:52 a. m.]

302 *Exhibit B to amended complaint*

39551-8/49

FCC 49-1155

Before the Federal Communications Commission

WASHINGTON 25, D. C.

Docket No. 9113

In the Matter of Promulgation of Rules Governing Broadcast of
Lottery Information

REPORT AND ORDER

By the COMMISSION: (Commissioners Coy, Chairman; Hyde and Jones not participating; Commissioner Hennock dissenting).

The Commission has this day determined to adopt the attached interpretative rules, set forth in the appendix to this Report, to be designated as Sections 3.192, 3.292, and 3.692. These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme

which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest. A Notice of Proposed Rule Making concerning this subject was issued by the Commission on August 5, 1948 and a Supplemental Notice of Proposed Rule Making was issued on August 27, 1948. Interested parties were afforded an opportunity to file briefs or statements setting forth why they believe the rules should or should not be adopted and oral argument on the matter was held before the Commission en banc on October 19, 1948.

Two major objections have been raised to the adoption of the proposed rules. In the first place, it is alleged that the Commission is not authorized by law to promulgate Rules or Regulations setting forth the type of programs the broadcast of which the Commission believes to be within the scope of the prohibition of Section 1304 of the Criminal Code, and therefore, contrary to the public interest. It has also been argued that even if the Commission possesses such rule-making authority, the particular rules proposed by the Commission do not, as a matter of substantive law, set forth violations of Section 1304. After careful consideration of these contentions, we have concluded, for the reasons set out below, that they are without merit and that the Rules should be adopted.

I

On the question of jurisdiction to promulgate the rules, we are able to reach the conclusions that the status of the
 303 prohibition on the broadcasting of lottery, gift enterprise, and similar schemes as a provision of the Criminal Code does not affect the fact that it is an important declaration of public policy by Congress in the broadcast field; that the Commission is under a duty to give effect to such public policy in its licensing functions; that this duty must be performed even where other agencies or the courts have concurrent powers which have not been exercised in the particular case before the Commission; that the Commission may in the exercise of authority under Section 4 (i) and 303 (r) of the Communications Act, set out in interpretative rules for the information and guidance of licensees and other interested persons, its interpretation of a statute, expressing public policy in the broadcast field and, therefore, an aspect of the standard of the public interest to be applied in licensing proceedings under Sections 307, 308, and 309 of the Communications Act; and that the issuance of such interpretative rules is in accordance with the provisions of the Administrative Procedure Act.

Section 1304 is itself a criminal provision making the broadcast of any lottery, gift enterprise or similar scheme by any broadcast licensee punishable by fine, imprisonment or both. It does not differ in this respect from the former Section 316 of the Communications Act which carried its own express penal sanctions. The reenactment of the substance of Section 316 of the Communications Act as Section 1304 of the Criminal Code on July 25, 1948, by Public Law 772, 80th Congress, 2nd Session, as part of a general recodification of the criminal law was not intended to affect, and did not in any way affect or change the impact of the prohibition against the broadcast of lottery information as a criminal prohibition expressing the public policy of the United States against the broadcasting of such programs. Both Section 1304 and the former Section 316 impose a duty upon the Department of Justice to prosecute apparent violations of the prohibition coming to its attention and, similarly, impose an obligation upon this Commission, as the agency of the federal government most closely in touch with the day-to-day operation of radio broadcasting, to refer those violations of the Section which come to its attention to the Department of Justice for appropriate action. It has been suggested that such periodic reference to the Department of Justice of apparent violations of law is the only obligation imposed upon this Commission, but this is clearly not so. Violation of any provision of law by a broadcast licensee or prospective licensee obviously is relevant to a determination as to whether such person has the requisite character qualifications of a licensee and to operate a station in the public interest. *Mester Brothers v. United States*, 70 F. Supp. 118, affirmed, 332 U. S. 749; see *Southern Steamship Company v. National Labor Relations Board*, 316 U. S. 31. This is especially true when the law involved deals directly with broadcasting and expresses a public policy so clear and strong that violation is made a criminal offense.

304 It is equally clear that the Commission may consider any violation of the prohibition against the broadcast of lottery information whether or not there has been a prior judicial determination in the particular case. *National Broadcasting Company v. United States*, 319 U. S. 190; *Southern Steamship Company v. National Labor Relations Board*, 316 U. S. 31, Cf., *Public Clearing House v. Coyne*, 194 U. S. 487. As the Supreme Court pointed out in the *Southern Steamship* case, *supra*, at pp. 46-47, the respective administrative agencies have an individual responsibility for giving effect to the public policy of the nation expressed in statutes other than their own, which cannot be avoided or postponed until some other agency or branch of the government, which may also have a responsibility arising out of the same legis-

lative mandate, has acted.¹⁴ In the present case, the relevant facts so far as the Commission is concerned, are that Congress in its enactment of Section 1304 and its predecessor, Section 316 of the Communications Act, has clearly determined that broadcasts of lotteries, gift enterprises, or similar schemes are not in the public interest; the additional determination that the carrying of such broadcasts may subject the offender to imprisonment or payment of fine does not in any way limit the Commission's responsibility to give heed to the explicit Congressional declaration as to the public interest in the broadcast field.

It has been argued that, whatever power the Commission might have to consider violations of the provisions of Section 1304 on a case-to-case basis, it may not adopt general rules setting out in advance for the information of licensees the course of action it intends to pursue. In our opinion, the determination to issue interpretative rules rather than to enunciate its views from case-to-case is not only proper but, under the circumstances, the only reasonable course for us to have taken. It should be made clear that these rules are not intended to require any licensee to refrain from taking any action which is not already forbidden by statute. They merely set forth, to the extent that any general statement is possible, the Commission's interpretation of the existing Congressional mandate with respect to broadcasts of lotteries, gift enterprises, and similar schemes. As such, they will provide licensees with information by which they may better determine, in advance of Commission action in licensing proceedings, the interpretation of the law which the Commission will follow in determining the legality of particular programs in licensing proceedings.

In view of the almost infinite variety of program format details possible in connection with "give away" schemes, interpretation of the statute solely on a case-to-case basis may readily leave licensees in deep confusion as to the applicability of the statute in situations other than the precise scheme involved in a particular case. But despite the variety of possible details, a number of common recurrent features, which embody the elements at which the statute is aimed, can be identified in order to clarify the application of

¹⁴ In the course of the legal attack upon the Commission's Chain Broadcast rules a similar claim was made that the Commission could not consider activities which might possibly constitute unconvicted violations of the antitrust laws since, under Section 311 of the Communications Act, it was authorized to refuse a license to any person who had been found guilty of violating these laws. In rejecting this argument and upholding the right of the Commission to promulgate its rules the Supreme Court stated (*National Broadcasting Company v. United States*, 319 U. S. 223):

"A licensee charged with practices in contravention of this standard [public interest, convenience or necessity] cannot continue to hold his license merely because his conduct is also in violation of the antitrust laws and he has not yet been proceeded against and convicted . . . Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the 'public interest' merely because its misconduct happened to be an unconvicted violation of the antitrust laws."

the statute in particular situations. Announcement of interpretative rules in an area where the details may obscure the more general principles which are readily identified, thus serves both to diminish the perils of uncertainty and to remove the refuge of the opinion of counsel, which may vary not only with different cases, but with different counsel. Just as the licensee is entitled to come before the Commission and state that he relied on the opinion of counsel in determining what was illegal and contrary to the public interest, so the Commission may afford the licensee guidance by stating what it believes the law to be in the form of interpretative rules.

Since any such interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret, Cf *Skidmore v. Swift & Co.*, 323 U. S. 134, 140, adoption of the rules may make available to persons who may have property interests directly and immediately affected adversely by their adoption an opportunity to secure a judicial determination of the validity of any such application of the rules in advance of Commission action in licensing proceedings and without the expense, delay in time and licensee jeopardy which would be involved if the Commission's interpretation of the law were to be developed and disclosed only in the course of such proceedings. Cf. *Columbia Broadcasting System v. United States*, 316 U. S. 407.

Sections 4 (i) and 303 (r) of the Communications Act expressly authorize the Commission to make such rules and regulations, not inconsistent with "this Act" or "law", as may be necessary either "in the execution of its (Commission's) functions", or "to carry out the provision of this Act." The claim that in spite of these provisions the Commission, in the exercise of its licensing func-

306 tions must announce applicable principles of law only on a case-to-case basis and may not issue general rules setting forth its understanding of the applicable law to be applied to recurring general problems of interest and importance to all licensees and applicants, has been expressly rejected by the courts. See *National Broadcasting Company v. United States*, 319 U. S. 190 affirming 47 F. Supp. 940; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 420-421; *Heitmeyer v. Federal Communications Commission*, 63 App. D. C. 180, 95 F. 2d 91; *Ward v. Federal Communications Commission*, 71 App. D. C. 166, 108 F. 2d 486; Cf. *Stahlman v. Federal Communications Commission*, 75 App. D. C. 176, 126 F. 2d 124; *Securities & Exchange Commission v. Chenery Corp.*, 332 U. S. 194; *Lichter v. United States*, 334 U. S. 742. As Judge Learned Hand stated for the District Court in the *National Broadcasting* case, *supra*, (47 F. Supp. 945):

"The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decisions until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future."

These considerations are applicable with even greater force where the administrative agency is not promulgating rules which constitute an exercise of delegated authority to forbid or require specified conduct on the basis of findings as to the public interest in the particular field, as in the National Broadcasting Company case, *supra*, but is rather issuing interpretative rules for the purpose of stating its understanding of what Congress itself has found to be contrary to the public interest and has itself forbidden.

What we have said above disposes of the claim that the adoption of these rules would be in violation of Section 9 (a) of the Administrative Procedure Act, 5 U. S. C. 1009 which provides that "no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law." As the legislative history of the provision makes clear, Section 9 (a) was not intended to prohibit the issuance of any rules which an agency would otherwise be authorized to issue but was merely designed to "afford statutory recognition for the basic rule of law embodied in judicial decisions." Senate Judiciary Committee Print, June 1945, in Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 34. See also Sen. Doc. No. 248, p. 229 (Attorney General's Interpretation). And both the Senate and House Reports on the bills, which because the Administrative Procedure Act, made clear that Section 9 (a) was intended to prevent agencies from imposing types of sanc-
 307 tions which they had not been specifically or generally authorized to impose. Thus, if the Commission had not been given authority by Sections 4 (a) and 303 (r) to issue such general rules and regulations as might be necessary in the performance of its duties, and if sections 307, 308, and 309 of the Communications Act did not authorize the Commission to consider relevant aspects of the public interest in licensing proceedings, Section 9 (a) of the Administrative Procedure Act would have prevented the Commission from assuming such rule-making power just as it prevents the Commission from issuing cease and desist orders in the absence of authority to do so. See Senate Report on S. 7 in Sen. Doc., 248, 79th Cong. 2d Sess. p. 211 and House Report on S. 7 in Sen. Doc. 248, 79th Cong. 2d Sess. p. 274.

While the Senate Report, *supra*, makes clear that Section 9 (a) of the Administrative Procedure Act prohibits one agency from exercising the functions of another, these rules, as indicated above, are not an enforcement of the Department of Justice's authority to prosecute violations of Section 1304 of the Criminal Code, but an aid to the exercise of the Commission's independent jurisdiction and authority to license applicants for station licenses when, and only when, the grant of such application would serve the public interest, convenience, or necessity.

II

After examination of the arguments presented, the Commission is convinced that the features of programs covered by the proposed rules come within the scope of the languages "lotteries, gift enterprises, or similar schemes dependent in whole or part on lot or chance" set forth in Section 1304 of the Criminal Code. For the purposes of considering whether the rules before us are a proper interpretation of the statute, it is unnecessary to resolve the question of the extent to which the statutory terms "gift enterprises or similar scheme" may include more than the statutory term "lotteries". For, in interpreting the statute we conclude that the statutory term "lottery" includes more than the popular conception of "lottery" in which the opportunity of participating in the selection of a winner of prizes is itself purchased and paid for in cash. This view is borne out by the case of *Horner v. United States*, 147 U. S. 449. Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area."¹⁵

308 The element of "prize" raises no substantial problem—all of the program schemes described in the rules involves the distribution of money or other valuable prizes. There is similarly no serious question concerning the element of chance. While there are many bona fide contests open to all in which the element of skill is primarily determinative of the winner or winners of the

¹⁵ It must be recognized that the statute itself does not prescribe the element of consideration. The statute itself therefore leaves open the view that any scheme containing the characteristics of "offering prizes depending in whole or in part on lot or chance" is within the scope of its prohibition, and that the language "similar scheme" refers to the common possession of these characteristics and is not intended to limit the application of the statute to such schemes as are found to possess all the elements of lotteries, in addition to those aspects of lotteries which are identical with the characteristics which are in terms described in the statute. However, we leave this question open, for we do not now intend to foreclose by these interpretative rules a judicial conclusion that we have not covered as many situations as the language and intent of the statute extend to. We believe that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or whether it be more broadly read.

prizes which the statute does not forbid, in each of the cases set forth in the attached rules the element of chance determines in whole or in part the identity of the persons to whom the prize is to be awarded.

The only substantial issue presented is whether such programs also involve the element of "consideration", assuming it to be a necessary element of schemes forbidden by the statute. We think that in each of the instances specified by the rules, consideration of some form is present. While only category "J" requires a prospective winner to have directly contributed money or purchased goods as a condition of success, it has been clear even since the decision of the Supreme Court in *Horner v. United States*, 147 U. S. 449 (1893) that no such restricted definition of the term "consideration" is applicable to the problem and that a scheme may come within the scope of the statutory prohibition, which offers prizes dependent upon lot or chance even where the participants in the schemes are not risking the loss of any money through their participation.

In determining whether the element of consideration is present in any radio "giveaway" schemes, we must consider the problem in context of the unique nature of the medium of radio. Unlike the motion pictures and theatre, no charge is made by the licensee to members of the public for access to any programs. Nor, as in the case of newspapers and magazines, must a copy of a publication be purchased to secure the information, entertainment and advertising presented. Section 3 (c) of the Communications Act defines "Broadcasting" as "the dissemination of radio communications intended to be received by the public * * *". Most licensees support their operations by the sale of time to advertisers who seek to reach the public.¹⁶ We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create "circulation" as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or services.¹⁷

¹⁶ Public Service Responsibility of Broadcast Licensees, 40-41.

¹⁷ In the opinion of the Supreme Court in *Federal Communications Commission v. Sander Brothers*, 309 U. S. 470, Mr. Justice Roberts observed:

"Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

In this context, preoccupation with such forms of furnishing of consideration to the advertiser, by such means as the purchase of his product or the furnishing of box tops as a condition precedent to participation in a scheme may obscure the valuable benefit furnished to the licensee in the form of "circulation" when the listener is induced by a scheme for the awarding of prizes based on chance to listen to a particular station and program. Cf. *Brooklyn Daily Eagle* 1. Voorhies, 181 Fed. 579, 581-582 (C. C. E. D. N. Y.). Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and "circulation" to the sponsor, and to the sponsor as well, who presents his advertising to the audience secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen. Any supposition that there must be a direct sale or other form of contract before a scheme involving some form of consideration is presented does not take into account the nature of the medium of broadcasting and its economics. We do not believe that Congress in announcing a public policy particularly applicable to the field of broadcasting intended only to proscribe schemes designed for other media such as direct solicitation or publications, and intended that the relevant legal analysis should not take into account the nature of the medium of radio.

Accordingly, it is ordered this 18th day of August, 1949, that Sections 3.192, 3.292 and 3.692 as set forth in the attached appendix be adopted effective October 1, 1949.

By direction of the Commission:

T. J. SLOWIE,
Secretary.

Attach.

Released: August 19, 1949.

The following is the text of Section 3.192, 3.292 and 3.692.

LOTTERIES AND GIVE-AWAY PROGRAMS.—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to fol-

low a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304.)

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize;

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

311 DISSENTING VIEWS OF COMMISSIONER HENNOCK

I believe that the Proposed Rules should not be adopted. These rules purport to interpret for the benefit of broadcast licensees Section 1304 of the Criminal Code which prohibits, with criminal sanction, the broadcast of "any advertisement of or information concerning any lottery, gift, enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance."

The concept of "lottery" has a long legal history. This provision, or ones similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the term "lottery" is novel in at least one respect. This is the first instance in which a scheme has been called a lottery when the sole consideration supporting it is nominal or other than the payment of something of value. Even in the "Bank Night" cases, e. g., *Commonwealth v. Lund*, 15 A. (2d) 839, although particular individuals were allowed to participate without the purchase of a ticket or the payment of any valuable consideration, such consideration was paid by the great mass of the participants. Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. If the so-called "giveaway" programs, at which these Rules are ostensibly directed are, in fact, in violation of Section 1304, I believe this should be determined by a court after proper evaluation in a particular case. Since the lottery prohibition which was formerly Section 316 of the Communications Act of 1934, as amended, has been deleted from the Act which sets forth the duties and powers of this agency, I feel that, without a specific mandate from Congress for us to curb the prevalence of this type of program, our action today is unwarranted. For this reason, I suggest that the matter be brought to the attention of the Congress and of the Department of Justice for any action which they may deem appropriate to have taken.

312 *Exhibit C to amended complaint*

NBC

YOU BET YOUR LIFE

April 4, 1951, 9:00-9:30 p. m.

313 MR. FENNERMAN. Ladies and gentlemen, the secret word tonight is hand, h-a-n-d.

MR. MARX. Really?

MR. FENNERMAN. You bet your life.

The more than 3,000 DeSoto-Plymouth dealers of America present Groucho Marx in *You Bet Your Life*, the comedy quiz series produced and transcribed from Hollywood, and here he is, the one, the only Groucho.

MR. MARX. That's me, Groucho Marx.

Well tonight we have got \$5,500 for one of our couples, George, more than we have ever given away before. I hope somebody takes it away from me. It has been keeping me awake nights.

Now, then, who's first to try for the \$5,500?

Mr. FENNERMAN. We have invited some old-time Western characters to the program tonight and just before we went on the air our studio audience selected Mr. Fred Noller and we invited an Indian to be his partner, Mr. Bill Wilkerson, and here they are. Gentlemen, meet Groucho Marx.

Mr. MARX. Welcome gentlemen, welcome from the DeSoto-Plymouth dealers. And if you say the secret word you will divide \$100. It's a common word, something you always have with you. Let's see, wild Westerner and an Indian. Mr. Fred Noller, you are the Westerner, I presume?

Mr. NOLLER. Yup.

Mr. MARX. Where are you from, Podner?

Mr. NOLLER. Arizona Territory, that is, Arizona before it became a state.

Mr. MARX. How long have you been out here?

314 Mr. NOLLER. I have been out here since right after the war.

Mr. MARX. Which war are you referring to?

Mr. NOLLER. The last one.

Mr. MARX. Bill Wilkerson, you are the Indian, eh?

Mr. WILKERSON. Yes, sir.

Mr. MARX. How?

Mr. WILKERSON. How? My father and mother were Indians.

Mr. MARX. Ugh. Where are you from, Bill?

Mr. WILKERSON. I was born in Indian territory.

Mr. MARX. You two weren't neighbors, were you?

Mr. WILKERSON. Not quite, but I was born in Indian territory which is now Oklahoma.

Mr. MARX. Isn't Bill Wilkerson a kind of odd name for an Indian?

Mr. WILKERSON. Well, yes, but we took that name from missionaries about 160 years ago that were from Boston.

Mr. MARX. Is that all you took from them?

Mr. WILKERSON. That's all we were able to take at that time.

Mr. MARX. Don't you have a tribal name?

Mr. WILKERSON. I have my own Indian name.

Mr. MARX. What is that?

Mr. WILKERSON. Okonstata.

Mr. MARX. I used to play it three-handed. How did you get that name?

Mr. WILKERSON. An old Indian lady by the name of Terrapin gave it to me.

315 Mr. MARX. Terrapin?

Mr. WILKERSON. Yes, like dry land turtle. She prophesied that I would talk and sing before many strange people.

Mr. MARX. You couldn't get a stranger crowd than this out here. Are you married, Bill?

Mr. WILKERSON. Yes, sir.

Mr. MARX. You are a brave all right. Do Indians have a regular marriage contract or just a kind of blanket contract?

Mr. WILKERSON. In the old days it was a blanket contract. Today we have to abide by the rules and regulations.

Mr. MARX. What tribe are you from, Bill?

Mr. WILKERSON. I am a Cherokee.

Mr. MARX. Did you know I am a Black Foot?

Mr. WILKERSON. You don't look like one.

Mr. MARX. I'm not a Black Foot Indian, I'm just a black foot, with the cheap socks I wear. I used to know an Indian who was a lawyer, a Sioux Indian. Do you know anyone like that?

Old timer, what sort of work do you do?

Mr. NOLLER. I work down at Nutz Berry Farm.

Mr. MARX. Nutz Berry Farm?

Mr. NOLLER. Yes.

Mr. MARX. What is it?

Mr. NOLLER. A berry farm and a fellow by the name of Nutz started it.

Mr. MARX. What's a berry farm?

Mr. NOLLER. It's a pretty good sized spread. He has three or four hundred acres there and he has big chicken dining rooms and a steakhouse where he serves a lot of people.

316 Mr. MARX. How many people do you feed out there?

Mr. NOLLER. Well, I reckon about the biggest time they had was last Father's Day there were about 11,000, a little over, out there for dinner.

Mr. MARX. On Father's Day you served 11,000 dinners?

Mr. NOLLER. That's right.

Mr. MARX. That's typical. 11,000 mothers decided to celebrate Father's Day by letting the old man take them all out to dinner.

Let us see how you work together as a team. Just one minute. You are going to play You Bet Your Life for a chance at \$5,500. First there is something of importance I want you to hear about.

Mr. FENNERMAN. When you drive the new 1951 DeSoto you will enjoy added comfort and pleasure thanks to DeSoto's famous Aero-flow shock absorbers, a longer wheelbase and a full cradle ride. Yes, no other car rides like a DeSoto. And DeSoto also give you a wonderful feeling of safety and security. Just suppose you need to stop and in a hurry. Well, DeSoto's big, new 12-inch

brakes will quickly bring you to a safe, smooth stop. No other car in America has larger brakes. And DeSoto's chair-high seats let you sit up comfortably with a full view of the road ahead. There's more visibility, too, with the new, wider, deeper windshield and rear window, and should a blow-out occur, DeSoto's safety rim wheels help keep the car under control.

Well, that, folks, should give you a pretty good idea of the new DeSoto's greater safety, and when you add to that its
317 extra comfort, you will discover why DeSoto is your best buy for the years ahead. So visit your DeSoto-Plymouth dealer tomorrow and see this beautiful 1951 DeSoto for yourself.

Mr. MARX. Let's see if you will get the chance at the \$5,500. George, Mr. Fennerman, will you explain the rules to these old trappers over here.

Mr. FENNERMAN. You bet as much of your \$20 as you want on each of four questions. The couple that earns the most money gets a chance at the \$5,500 DeSoto-Plymouth question at the end of the show.

Mr. MARX. All right, here we go. Let's see how high you can build your \$20. You selected fighting presidents. Here's your first question. How much of the \$20 will you bet?

Mr. WILKERSON. Make it about \$18.

Mr. NOLLER. That's good. Just one thing. If we don't win, you won't be too disappointed, will you?

Mr. MARX. No, I won't, but I think you will. I want everybody to win on this show.

Mr. NOLLER. Thank you.

Mr. MARX. It's not my money. What was the name of the president who led the Union forces during the Civil War?

Mr. WILKERSON. U. S. Grant.

Mr. MARX. U. S. Grant is right.

Mr. FENNERMAN. You fellows are on your way. You have \$38.

Mr. MARX. You are going for \$5,500. How much of your \$38 will you bet on your second question?

Mr. NOLLER. \$35.50.

318 Mr. MARX. \$35.50. What was the name of the president who served with the 129th Field Artillery during the first World War?

Mr. WILKERSON. Truman.

Mr. MARX. Harry Truman is right.

If he's an Indian, I'm a monkey's uncle, and don't think that couldn't be true.

Mr. FENNERMAN. You have 30—70.

Mr. MARX. Get this man a mathematician here.

Mr. FENNERMAN. I had it for a minute.

Mr. MARX. Where do you live? I bet you don't know where you live.

Mr. FENNERMAN. Yes, I do.

Mr. MARX. Where?

Mr. FENNERMAN. 5300—you don't—you have here, it's right here, \$73.50.

Mr. MARX. All right. How much of this are you going to risk this time?

Mr. WILKERSON. \$73.

Mr. NOLLER. No, \$70.

Mr. WILKERSON. I hope we'll get enough for a hamburger out of this.

Mr. MARX. The chief says he hopes he gets enough for a hamburger out of this. What was the name of the president who was a major general in the Civil War, he was assassinated by a disappointed office seeker?

Mr. NOLLER. He ain't saying which side of the fence he was on.

Mr. MARX. I'm sorry. It was James Garfield. There were only three presidents assassinated. You should have known that.

Mr. FENNERMAN. You now have \$3.50.

Mr. MARX. See how quickly Fennerman figures that out.

Mr. NOLLER. Shoot it all.

Mr. MARX. Here's your last chance to beat the other couples. How much will you bet, everything?

Mr. NOLLER. Sure.

Mr. MARX. What was the name of the president who was the hero of the Battle of New Orleans? He was called Old Hickory.

Mr. NOLLER. Andrew Jackson.

Mr. MARX. Andrew Jackson is right.

Mr. FENNERMAN. Wait a minute, Fellows, we can't let you go with just \$7.

Mr. MARX. You can't even get a hamburger for \$7. We can't have anybody going away from here broke. I'll give you one more question and get it right and you will win \$10. No help from the audience. In what sport do you wear tennis shoes?

Mr. NOLLER. Tennis.

Mr. MARX. Tennis is right.

Mr. NOLLER. Thank you.

Mr. WILKERSON. Thank you.

Mr. MARX. Thank you, good luck from the DeSoto-Plymouth dealers.

Mr. FENNERMAN. We invited some people to the show tonight who give intelligence tests and just before we went on the air our studio audience selected Mrs. Jean Judson. Her partner is

320 a married man from the audience, Mr. William Share and here they are. Folks come in here and meet Groucho Marx.

Mr. MARX. Welcome to You Bet Your Life. Say the secret word and divide \$100 between you. It's a common word, something you always have with you. Let's see, we have an intelligence tester here. If I was smart, I'd leave by the back door and quietly.

Mrs. Jean Judson, you are the intelligence tester. Where are you from?

Mrs. JUDSON. I'm from all over, Groucho.

Mr. MARX. You're from all over Groucho? Where are you from, specifically, Jean?

Mrs. JUDSON. I was born in Chicago. Then I went to Kansas, then to Idaho, then to Minnesota.

Mr. MARX. What were you doing; were you selling vacuum cleaners? Why were you traipsing around the country?

Mrs. JUDSON. My father's job changed and then my mother's job changed and then I found my own.

Mr. MARX. Found your own mother and father?

Mrs. JUDSON. No.

Mr. MARX. That's kind of sad, a woman searching all over America for her parents. Where were they at the time? Were they with you when you were born?

Mrs. JUDSON. I think so.

Mr. MARX. That's handier. What's your home town, William?

Mr. SHARE. Louisville, Kentucky.

Mr. MARX. What sort of work do you do?

Mr. SHARE. When I was on the road I sold ladies' lingerie.

321 Mr. MARX. That's pleasant. Intimate. What are you doing now?

Mr. SHARE. I'm waiting for my orders to report to the Army; I have been drafted.

Mr. MARX. I don't know what to say about that, except that's not the ideal place to sell lingerie. You are married, too?

Mr. SHARE. Yes, I am.

Mr. MARX. You certainly don't look it. You look like you are enjoying yourself. Are you sure you are married?

Mr. SHARE. Five years.

Mr. MARX. Could you prove it; could you let me see your marriage license?

Mr. SHARE. I don't have those with me.

Mr. MARX. Slippery, aren't you? I bet you \$10 right now I can prove you're not married. Do you want to bet?

Mr. SHARE. I haven't got ten bucks.

Mr. MARX. Well, I lose. If you don't have ten bucks, you're married all right. Here's your dough.

Mr. SHARE. Thank you.

Mr. MARX. You ought to get acquainted with the Indian we had out here. He can lend you some money; he got a couple of bucks at home. If I keep on chattering, I will not only prove I'm a dope but also that I'm broke.

Let us talk about this intelligence testing. Who do you work for, Jean? I forgot I was talking to an intelligence tester. I beg your pardon. Whom do you work for? I have to be
322 careful, somebody from the New Yorker might be listening. Who do you work for, Jean?

Mrs. JUDSON. For the Educational Testing Service.

Mr. MARX. What kind of racket is that; what do they do?

Mrs. JUDSON. We test the high school seniors who are applying for entrance into college.

Mr. MARX. Let me see you try it on Bill over here. Ask him some questions. Go ahead, Jean.

Mrs. JUDSON. Well, if it takes three men six days to finish a job, how many men can finish that job in twelve days?

Mr. SHARE. I would say four.

Mr. MARX. Why don't you. Jean, what would you say, would you say he is right?

Mrs. JUDSON. No. The right answer to that is a man and a half.

Mr. MARX. That may be the right answer, but where are you going to hire a man and a half. Of course, you could hire one, but I won't be out of work until summer.

Now, Jean, I don't think that was a fair question. Try another one, where the answer is a whole man. Go ahead, what's another of your test questions?

Mrs. JUDSON. Here's one for you, Groucho. If you see a train approaching very fast on a track—

Mr. MARX. That is a good place for it.

Mrs. JUDSON. If you see a piece of rail is missing from the track, what would you do?

Mr. MARX. I'd get off and take the American Airlines. Do I have a choice or what?

323 Mrs. JUDSON. You have a choice of three answers: Would you look for a piece of missing rail to fit in, would you call an ambulance or would you signal the engineer to stop the train.

Mr. MARX. Is the train going north or south?

Mrs. JUDSON. It doesn't matter.

Mr. MARX. It doesn't matter, huh?

Mrs. JUDSON. No.

Mr. MARX. It would to me, if I were on the train.

Okay, let's say I would call an ambulance, am I right?

Mrs. JUDSON. No; you should signal the engineer to stop the train.

Mr. MARX. That's not true. By the time I figured out the question the correct thing to do would be to call an ambulance.

Well, I have learned a lot about intelligence quotients. Is that what you call it?

Mrs. JUDSON. That's right.

Mr. MARX. Let us see if you two are smart enough to run your \$20 into more than our other couples. Then you can take away the \$5,500 from me. Now Mr. Fennerman, that is George, is off stage to remind our listeners how much the first couple won.

Mr. FENNERMAN. The western character and the Indian won \$7.

Mr. MARX. Here we go, let's see how high you can build your \$20. You selected famous hotels. Here is your first question, how much will you bet?

Mr. SHARE. \$18.

Mr. MARX. He is an undercover man; he used to sell lingerie.

324 In what city is the Palmer House Hotel?

Mrs. JUDSON. Chicago.

Mr. MARX. Chicago, Chicago.

Mr. FENNERMAN. You're on your way. You have \$38.

Mr. MARX. Remember, you're going for \$5,500 tonight. That's the most we ever had. How much of your \$38 are you going to bet this time?

Mr. SHARE. \$35?

Mrs. JUDSON. Yes.

Mr. SHARE. \$35.

Mr. MARX. How much?

Mr. SHARE. \$35.

Mr. MARX. In what city is the Mark Hopkins Hotel?

Mr. SHARE. Atlantic City.

Mr. MARX. No, I'm sorry, kids, it's San Francisco. You should have known that. It's a very famous hotel and you've been on the road all these years.

Mr. FENNERMAN. You have \$3 now.

Mr. MARX. That's a shame. Here's your third question. How much of the \$3 you going to bet?

Mrs. JUDSON. Bet it all.

Mr. MARX. In what city is the Town House Hotel?

Mrs. JUDSON. Boston.

Mr. MARX. Los Angeles. It's right down here on Wiltshire Boulevard.

Mr. FENNERMAN. They've gone broke, Groucho.

Mr. MARX. We can't let them go away broke. We'll have to give them another question. This is for \$10; if you get this
325 right, I'll give you \$10. And please, no coaching. Think carefully, this is a toughie. Who is buried in Grant's Tomb?

Mr. SHARE. Grant.

Mr. MARX. General Grant is right. Thank you and good luck from the DeSoto-Plymouth dealers.

Mr. FENNERMAN. Groucho, we invited some beauty contest winners to the program tonight and just before we went on the air our studio audience selected Vera Miles. Her partner is a bachelor, Mr. Victor Desny.

Folks, come in here and welcome Groucho Marx.

Mr. MARX. Welcome for the DeSoto-Plymouth dealers. Say the secret word and you will divide \$100. It's a common word, something you always have with you.

A beauty contest winner, now you're talking. This calls for a little closer inspection. Your name is Vera Miles?

Mrs. MILES. That's right.

Mr. MARX. That's a very pretty name and you're a very pretty girl. Where are you from?

Mrs. MILES. I'm originally from Kansas.

Mr. MARX. From Kansas?

Mrs. MILES. Yes.

Mr. MARX. May I ask how old you are?

Mrs. MILES. Twenty.

Mr. MARX. I'm a man of very few words, Vera. How about joining me at a big party after the show? Would you like that?

Mrs. MILES. It sounds like a lot of fun.

Mr. MARX. How do you know it will be a lot of fun? You don't know who is going to be there. Do you want to know, Vera?

326 Mrs. MILES. Yes. Who is going to be there?

Mr. MARX. Just you and I. Does that still sound like fun, answer yes or no, Vera?

Mrs. MILES. No.

Mr. MARX. You don't have to answer quite so quickly. Couldn't you at least cogitate about this thing a little bit? Why wouldn't you like to go out with me after the show?

Mrs. MILES. Well, I'm married.

Mr. MARX. For a man of few words I certainly can talk myself out on a limb. Are you married?

Mrs. MILES. Yes.

Mr. MARX. Mr. Victor Desny, you're still here, are you?

Mr. DESNY. Yes.

Mr. MARX. Pardon me for ignoring you, but it's the best I could do at the moment. Where were you born, Mr. Desny?

Mr. DESNY. I was born in Montenegro.

Mr. MARX. How long since you were in Montenegro?

Mr. DESNY. I left when I was just a baby. I went to Albania, the home of my parents.

Mr. MARX. I must be slipping. I'm standing next to a beauty contest winner and what am I doing, I'm talking about Yugoslavia and Albania.

What are some of the beauty titles you held?

Mrs. MILES. I was first Miss Chamber of Commerce, then Miss Wichita, then Miss Kansas, then Miss Texas Grapefruit.

Mr. MARX. Miss Texas Grapefruit?

327 Mrs. MILES. Yes.

Mr. MARX. Was your father a squirt?

Mrs. MILES. And recently I have been chosen Miss Nu-Made Margarine, and I had the honor to represent Kansas in the Miss America pageant.

Mr. MARX. Tell us something about the Miss America contest. How long does it take to select a Miss America?

Mrs. MILES. It takes a week so that the judges can completely get acquainted with the girls.

Mr. MARX. Those fools who go out for the Supreme Court, eh.

Victor, old boy, I'm sorry I'm neglecting you. It's not that I'm forgetting you exactly, it's just that I'm not thinking of you, that's all. Victor, suppose Vera wasn't married and you saw her walking along the street in Albania, how would you approach her and make a date with her?

Mr. DESNY. I wouldn't do that.

Mr. MARX. You wouldn't?

Mr. DESNY. No.

Mr. MARX. You can go back behind the Iron Curtain.

Mr. DESNY. It's not allowed for a man in Albania to talk to a girl in the street. If it's absolutely necessary, like asking for a direction, he has to walk across the street and then holler at her.

Mr. MARX. He has to cross the street and holler at her if he wants a direction?

Mr. DESNY. That's right.

328 Mr. MARX. Suppose that isn't the question he wants to ask? How is she going to be able to reach him and slap his face, unless she has the arm of a gorilla? In that case he wouldn't want her.

Do they have bathing beauty contests in Albania?

Mr. DESNY. No.

Mr. MARX. Don't they bathe in Alabania?

Mr. DESNY. Yes, they do. But the women aren't allowed to expose their bodies in public. If they want to go to a beach, they have to go to a separate beach where the men can't see them.

Mr. MARX. What's the sense of bathing then? Do they wear bathing suits on the women's beaches?

Mr. DESNY. Yes, they do.

Mr. MARX. What kind, French bathing suits?

Mr. DESNY. Oh, no. They're much longer and they cover much more.

Mr. MARX. How do you know? I thought men couldn't see them?

Vickie, you would fit right in down at Muscle Beach in Santa Monica. Vickie, you've learned something of American women tonight. Do you think you would prefer to marry an Albanian or an American woman? Now think carefully now.

Mr. DESNY. Well, Mr. Marx, this is very difficult to answer. The American women have charm, personality and are very good companions, but the Albanian women are more humble and devoted to their husbands, especially they have lovely hands.

329 Mr. MARX. Vickie, you said "hands" and you and Vera are going to split \$100 between you. There is \$50 for you and \$50 for you, Vera.

What were you saying about the girls over there? You say they work harder and are more devoted to their husbands?

Mr. DESNY. Yes.

Mr. MARX. What I would do if I were you, I'd marry an American woman, and if you want devotion, you get yourself a St. Bernard dog.

You make a very attractive couple and it has been a pleasure talking to you. I'm sorry you're married. Vera. But that happens to all men. You're going to play You Bet Your Life, and if you beat our other two couples, you'll get your chance at the \$5,500 DeSoto-Plymouth question. I can't tell you how much the other couples won, but George is off stage to remind our listeners.

Mr. FENNERMAN. The western character and the Indian are still leading with \$7.

Mr. MARX. Here we go, let's see how high you can build your \$20. You selected songs by Groucho Marx; is that right?

Mrs. MILES. That's right. We're betting 19.

Mr. MARX. You're betting \$19?

Mrs. MILES. Yes.

Mr. MARX. Once I was happy but now I'm forlorn, like an old coat that is tattered and torn. I'm left in this wide world to fret and to mourn, betrayed by a girl in her teens.

330 Oh, I'm sorry, "The Man On The Flying Trapeze." I know I sing very badly, but I thought you would recognize that.

Mr. FENNERMAN. You now have \$1.

Mr. MARX. Okay (here's the second one. How much of the dollar are you going to bet?

Mrs. MILES. The \$1.

Mr. MARX. Boys and girls together, we could sing and waltz, while Chico played the organ, dah, dah, dah, dah.

Mrs. MILES. On the Streets of New York.

Mr. MARX. That's close enough, On the Sidewalks of New York.

Mr. FENNERMAN. Now you're climbing a little bit. You have \$2 now.

Mr. MARX. You are away up there, Vera; you're up to \$2. How much you going to bet on this one.

Mrs. MILES. All of it.

Mr. MARX. All of it?

Mrs. MILES. Yes.

Mr. MARX. Some think that the world is made for fun and frolic, and so do I, and so do I: Some think it's going to be melancholic—

Mrs. MILES. Funiculi Funicula.

Mr. MARX. Funiculi and Funicula, that's right.

Mr. FENNERMAN. Now you have \$4.

Mr. MARX. You have \$4. Your last chance to beat the other couples. How much of the \$4 you going to bet?

Mrs. MILES. All of it.

331 Mr. MARX. You're going to bet all of it. That was a shame, that one question.

Here's your last chance to beat the other couples. You're going to bet \$4.

(Sings.)

Mrs. MILES. The Bowery.

Mr. MARX. The Bowery is right.

Mr. FENNERMAN. You did come through, because your \$8 total means you get the chance at the DeSoto-Plymouth \$5,500 question.

Mr. MARX. Well, I'll ask them the big question in just one minute.

Mr. FENNERMAN. Here it is the first week in April and time to start thinking about getting your car ready for the warmer spring and summer months ahead. To put it in tip-top shape, to add more life and real pep to the engine mile after mile after mile, bring your car to a DeSoto-Plymouth dealer for a spring tune-up. Here you get treated fairly and squarely and you get expert serv-

ice, for the mechanics at a DeSoto-Plymouth dealer are trained in factory methods and they use factory designed and approved equipment. They'll inspect your car thoroughly; give your engine a complete tune-up and check the electrical system and they'll see to it that the radiator is drained and flushed, the chassis is inspected and lubricated and do the countless other jobs that will assure you of thousands of miles of trouble-free driving.

So no matter what kind of car you own, stop in for that really thorough spring tune-up at the sign of a DeSoto-Plymouth
332 dealer. Any of the more than 3,000 DeSoto-Plymouth dealers will be happy to serve you promptly, efficiently and at a fair price.

All right, Groucho, and here is the beauty contest winner and the bachelor. Will you come over here, please.

The winning couple are ready for the DeSoto-Plymouth \$5,500 question.

Mr. MARX. For \$5,500 I will give you 15 seconds to decide on a single answer between you. Think carefully and, of course, no help from the audience. Here it is. One of our greatest men isn't as well known as he should be. See if you can tell me who he is for \$5,500. He was our first chief justice of the Supreme Court. Who was it? What is the answer you two have decided upon?

Mrs. MILES. Johnson.

Mr. MARX. No, it is John Jay, J-a-y.

Mrs. MILES. Oh, I knew it.

Mr. MARX. I'm terribly sorry. That means the big question next week will be worth \$6,000. Well, you lost the big money but you won \$8 in the quiz, congratulations—\$100, too. You got \$108, that's not too bad.

Congratulations and thanks to both of you and to all of our contestants on the show tonight.

Mrs. MILES. Thank you.

Mr. FENNERMAN. Be sure to tune in again next Tuesday night at this time for the Groucho Marx Show when the big question will be worth \$6,000. Don't miss Groucho's television show, also presented by the Desoto-Plymouth dealers of America.

333 And America, all dealers who sell DeSotos also sell Plymouth. Two great cars, both products of the Chrysler Corporation.

Mr. MARX. When you drive in, tell them Groucho sent you. Good night folks.

Just be sure to visit your DeSoto-Plymouth dealer.

Mr. FENNERMAN. Folks, here's a reminder from the National Safety Council: Don't stick your neck out in traffic.

You Bet Your Life!

334 *Exhibit D to amended complaint*

NBC

\$64 QUESTION

April 1, 1951, 10-10:30 p. m.

335 **KEN ROBERTS.** Get set, America, here comes the \$64 Question. Yes, it is that take it or leave it game brought to you tonight and every Sunday night over these same NBC stations, the game America has played and loved for years.

And now here is the fellow who has asked more \$64 questions than any man alive, your paymaster of ceremonies, Phil Baker.

Phil BAKER. Oh, no.

Ken ROBERTS. Really—

Phil BAKER. Oh, no—

Ken ROBERTS. Phil Baker.

Phil BAKER. Good evening, thank you very much. Good evening, ladies and gentlemen, and welcome once again to the \$64 question—yes, this is Phil Baker again welcoming you to the \$64 question.

Here it is the 1st of April and spring is here, and I don't know how to tell you this, but every spring my wife and I get such silly notions. We get the urge to go to Coney Island and ride through the Tunnel of Love. Of course, we ride through the Tunnel of Love other times, too, but in the spring we try to get seats in the same boat. Yes, we do.

Well, spring—spring even affects little children. I saw two little boys in the park today. One little boy said, "Hello, my name is Billie. I am five." The other one said, "My name is Jimmy and I don't know whether I am four or five."

Billie said, "Well, when you see a little girl walk down to the street, does it give you kind of a funny feeling inside?"

Jimmy said, "Yes."

336 **Billie said, "You are five."**

Of course, spring does something to a man. I feel all keyed up. What an exciting day I had today. Two sets of tennis, 18 holes of golf, a chukker of polo. Yes, sir, those news reels are sure exciting. I knew I was going to louse that gag up tonight.

Now that the first week of spring has seen New York welcoming a robin from Florida, a bluebird from Georgia, and an Auriol from France, let us welcome from our studio audience Mr. Cole, who is from New York City.

How do you do, Mr. Cole.

Mr. COLE. How do you do.

Mr. BAKER. How are you today—today on this beautiful spring day?

Mr. COLE. Fine, Phil. How's yourself?

Mr. BAKER. Well, I'm pretty good, sir. You're a native of New York, are you?

Mr. COLE. That's right.

Mr. BAKER. 260 Riverside Drive?

Mr. COLE. That's right.

Mr. BAKER. I used to live up that way.

Mr. COLE. Yes, I know, years ago when I was a boy—that goes back to Billie Sunday's time—I used to see you in the Audubon Theater once in a while.

Mr. BAKER. That's right. That is way up in the Heights. Do you know some people around there?

Mr. COLE. Well, a few, not very many.

Mr. BAKER. Do you have any relatives up there?

Mr. COLE. I did have, but I don't have any more.

337 Mr. BAKER. It says here that you are a painter.

Mr. COLE. That's right.

Mr. BAKER. Painter, is that all you do for a living?

Mr. COLE. Well, mainly.

Mr. BAKER. That is an avocation or a vocation?

Mr. COLE. It's both.

Mr. BAKER. House painter or portraits?

Mr. COLE. Fresco work and art work.

Mr. BAKER. Do you have any hobbies?

Mr. COLE. Taxidermy once in a while.

Mr. BAKER. You're what?

Mr. COLE. Taxidermy once in a while.

Mr. BAKER. Taxi driver?

Mr. COLE. Taxidermist.

Mr. BAKER. Taxidermist—you stuff things?

Mr. COLE. That's right.

Mr. BAKER. What did you stuff last?

Mr. COLE. Mammals and groups of animals and butterfly mountings.

Mr. BAKER. Mammals?

Mr. COLE. Entomology.

Mr. BAKER. Did you ever stuff a taxi?

Mr. COLE. Yes, with a crowd.

Mr. BAKER. I have a fat aunt who stuffs a taxi all right.

Mr. COLE. I know what you mean.

Mr. BAKER. Before we get too dull here, let us go on with the show. What have you chosen, please?

Mr. COLE. No. 6.

338 Mr. BAKER. No. 6. Okay, here we go with No. 6. That is a category on London. These questions are all about London. For a dollar, according to the nursery rhyme, what animal went to London to visit a queen?

Mr. COLE. A cat.

Mr. BAKER. The pussy cat is good for a buck. All right, let us have a hand for the gentleman.

Here we go for \$2. Who lives at No. 10 Downing Street?

Mr. COLE. The Prime Minister.

Mr. BAKER. The Prime Minister, good for \$2. Do you want to try for \$4?

Mr. COLE. Yes.

Mr. BAKER. From what London abbey was the Stone of Scone stolen this year?

Mr. COLE. Westminster Abbey.

Mr. BAKER. Westminster Abbey. The suspects in the case, as you know, are Scottish nationalists.

Mr. COLE. That's right.

Mr. BAKER. They have had a long feud with the British.

Mr. COLE. That's right.

Mr. BAKER. Taking the Stone of Scone is only the beginning.

Mr. COLE. That's right.

Mr. BAKER. The next on the list is the Rock of Gibraltar.

For \$4—or for \$8—are you going in for \$8?

Mr. COLE. Yes.

339 Mr. BAKER. Whose headquarters are Scotland Yard?

Mr. COLE. The police.

Mr. BAKER. The police, the London metropolitan police.

Okay, shall we try for 16, sir?

Mr. COLE. Yes.

Mr. BAKER. Here is the question: What section of London corresponds to Chinatown in New York?

Mr. COLE. Soho or Piccadilly Circus.

Mr. BAKER. Where else? No help.

Mr. COLE. Limehouse.

Mr. BAKER. Limehouse is better, fine.

Have you ever been to London?

Mr. COLE. No, I have never been there. I have been there in story books.

Mr. BAKER. A very exciting section of London. The Chinese Limeys, the Limehouse Chinese are really something. I heard one tell a customer, "Me velly solly, but you lose tickey—no tickey, no washee, and that is precisely the way the bally situation stands, really." That is how he expressed himself.

Here we go for 32: Which one of these royal residences is not in London, Clarence House, Balmoral Castle, Marlboro House?

Mr. COLE. Balmoral Castle.

Mr. BAKER. Balmoral Castle is in Scotland. Good for you, sir. All right, will you try for \$64?

Mr. COLE. Yes.

340 Mr. BAKER. The \$64 question: What river is spanned by London Bridge?

Mr. COLE. The Thames.

Mr. BAKER. The Thames is good for \$64.

Our next guest is Mrs. Lillian Bell of Brooklyn. Yey Brooklyn. How are you, Mrs. Bell?

Mrs. BELL. I am fine; and how are you, Mr. Baker?

Mr. BAKER. I'm fine. Have you been listening to this show?

Mrs. BELL. Yes, I have, every Sunday night.

Mr. BAKER. Do you enjoy it?

Mrs. BELL. Yes, I have.

Mr. BAKER. Have you ever been a contestant on a quiz show before?

Mrs. BELL. No.

Mr. BAKER. Are you a housewife?

Mrs. BELL. That's right.

Mr. BAKER. Speak right up as though the microphone were your husband.

Mrs. BELL. I just happen to be very nervous.

Mr. BAKER. The microphone won't talk back, either. How long have you been a housewife?

Mrs. BELL. Eleven years.

Mr. BAKER. How about giving the ladies listening the benefit of your experience? Suppose you tell us the best way to handle a husband?

Mrs. BELL. You don't, you just let him go as he is.

Mr. BAKER. Where were you when I was looking for a wife?

341 All right, Mrs. Bell, what questions have you chosen, please?

Mrs. BELL. I have chosen 1.

Mr. BAKER. That is accordion and orchestra.

Popular music, strong, silent stuff. Each of these song titles consists of just one word. How many do you know for a dollar. Let us try it.

[Music.]

Mrs. BELL. "Who."

Mr. BAKER. Huh?

Mrs. BELL. "Who."

Mr. BAKER. "Who" is correct for a buck.

All right, shall we go for \$2?

Mrs. BELL. Yes, we shall.

Mr. BAKER. I'm going to play the accordion for you.

Mrs. BELL. It's a pleasure.

Mr. BAKER. You'll be sorry, you'll see.

[Music.]

Mr. BAKER. What's the name of that?

Mrs. BELL. I wouldn't know.

Mr. BAKER. Nothing.

[Music.]

Mrs. BELL. "Summer Time."

Mr. BAKER. I can't hear you.

Mrs. BELL. I'll let you play it.

Mr. BAKER. Thank you.

Mrs. BELL. "Summer Time."

Mr. BAKER. I heard you now. Okay for \$2. Let us go for \$4?

342 Mrs. BELL. Yes.

[Music.]

Mr. BAKER. One word.

Mrs. BELL. "Always."

Mr. BAKER. I can't hear you. What is the use of my practicing all week. That was the biggest hit 25 years ago. Do you know that?

Mrs. BELL. No.

Mr. BAKER. Just for fun, see if you can tell me what song was the biggest hit of last year. Well, it was "Good Night Irene." Remember?

Mrs. BELL. Yes.

Mr. BAKER. "Good Night Irene" was such a big hit they are writing a sequel to it. It's called "Nobody Is Singing Good Night Irene, Since Irene Started Taking Ovaltine."

That's not funny, but Ovaltine could be a sponsor, you know. Okay, here we go for \$8. Let's try it.

[Music.]

Where are you going from here?

Mrs. BELL. Home.

Mr. BAKER. Home is the number. Right for \$8. Thank you.

[Music.]

Mrs. BELL. "If." "If."

Mr. BAKER. Who?

Mrs. BELL. "If."

Mr. BAKER. "If" is right. That is correct.

Okay, you want to try for 32?

343 Mrs. BELL. Yes.

Mr. BAKER. Here is the song.

[Music.]

Mrs. BELL. "Maybe."

Mr. BAKER. No. What is the title? No help. "Maybe I'm Right and Maybe I'm Wrong, and Maybe I Shouldn't Be Singing This song," but here is the title.

Mrs. BELL. "Nevertheless I'm In Love With You."

Mr. BAKER. Did you hear the lady?

Mrs. BELL. No, I honestly didn't.

Mr. BAKER. Are you sure about that?

Mrs. BELL. Yes.

Mr. BAKER. I'm going to believe you. Okay, fine, that's 32 bucks. Let us try the \$64 song.

[Music.]

Mrs. BELL. "Dance, Ballerina, Dance."

Mr. BAKER. "Ballerina," that gives you \$64 and congratulations.

All right, sir, I'll be back with more contestants in a moment, but first Ken Roberts has an announcement he would like to make.

Mr. ROBERTS. This is a story about two men who worked side by side in the same business, yet one has money put aside to build a home one day while the other hasn't a dime. How come? Today he is enjoying security and he is proud to know he's aided his country's defense. If he can do it, so can you. Put twice as

much in defense bonds now. Save money before you spend
344 it. With the automatic purchase of bonds you will pile up savings that may buy you a home of your own, a college education for the kids and old age without financial worries. Join the part payment payroll savings plan where you work or, if you are self-employed, use the bond-a-month plan at your bank.

Remember, defense is your job. Buy United States defense bonds.

Mr. BAKER. This is Phil Baker following through with the \$64 Question, and here is our next guest, Private First Class Allen Turnbull of the United States Army. How about a round of applause for the fellow?

How are you tonight, sir?

Pfc. TURNBULL. I am fine, Mr. Baker, fine.

Mr. BAKER. I'm very happy to see you.

Pfc. TURNBULL. Very glad to be here.

Mr. BAKER. Gee, you're a good looking guy.

Pfc. TURNBULL. Thanks.

Mr. BAKER. How old are you?

Pfc. TURNBULL. 23.

Mr. BAKER. How long you been in?

Pfc. TURNBULL. Just about five months, sir.

Mr. BAKER. Would you be incriminating yourself by telling me what you've been doing all day?

Pfc. TURNBULL. Well, I don't think so. Seeing New York for about the last time.

Mr. BAKER. Is it expensive roaming about town?

Pfc. TURNBULL. Very expensive.

Mr. BAKER. Whatever you spend, I am going to give you a chance to get it back. You going to quit at \$8 or stay in there for the full \$64.

345 Pfc. TURNBULL. I'll stay all the way.

Mr. BAKER. You can't tell, I might decide to go right on past \$64. It's amazing the way money accumulates when you keep on doubling it. If you would answer 10 questions, you would own this station. I better not risk it, though. You would have no trouble getting me to give it to you, but your trouble would be getting Milton Berle to give it up. He was just signed for 30 years. He just signed a contract with NBC for 30 years. Can't you just hear him now: "This is Uncle Miltie. Would you care to help me across the street?"

Pfc. TURNBULL. I would hate to be in the Army that long.

Mr. BAKER. Well, I would hate for you to be in the Army that long. I hope we will certainly have peace, and very soon.

Do you like this city?

Pfc. TURNBULL. Yes, very much.

Mr. BAKER. I was very happy to get back to New York. I offered to entertain the United Nations Security Council. They turned me down. They said everything was going along fine, they didn't want people to start walking out all over again. I don't know what happens to these jokes lately. Is there a cat walking around the studio here?

All right, Private First Class Allen Turnbull of Milburn, New Jersey, what have you chosen?

Pfc. TURNBULL. Category No. 8, name the country.

Mr. BAKER. Category No. 8, name the country. All right. You will have to tell me in what country you would be if you landed at each of the following seaports and went by car
346 to the following points of interest.

For a dollar, if you landed at Cork and went by car to Limerick?

Pfc. TURNBULL. I would be in Ireland.

Mr. BAKER. Ireland is right; fine.

For \$2, if you landed at Bremerhaven and went by car to Heidelberg?

Pfc. TURNBULL. I would be in Germany.

Mr. BAKER. Germany is good; fine. You are better at geography than another contestant I once had. I asked him, "Where are the Alps?" He said, "I don't know. If you put things where they belong, you would be able to find them."

Here we go for \$4. In what country would you be if you landed at Amsterdam and went by car to The Hague?

Pfc. TURNBULL. I would be in Holland.

Mr. BAKER. Holland is good for \$4. What do you want to do now?

Pfc. TURNBULL. I will go on for \$8.

Mr. BAKER. Eight bucks. In what country would you be if you landed at Barcelona and went by car to Granada?

Pfc. TURNBULL. Spain.

Mr. BAKER. Spain is good. Do you want to try for \$16?

Pfc. TURNBULL. Yes, I certainly do.

Mr. BAKER. Tell me what country you would be in if you landed at Halifax and went by car to Ottawa?

Pfc. TURNBULL. Canada.

Mr. BAKER. Canada is good for \$16.

347 All right, in what country would you be if you landed at Capetown and went by car to Mafeking?

Pfc. TURNBULL. In the Union of South Africa.

Mr. BAKER. South Africa is good for 32 bucks.

If you landed at Norfolk and went by car to Williamsburg?

Pfc. TURNBULL. I would be in the United States.

Mr. BAKER. United States—gives you \$64 and congratulations.

Stand by. All right. Here is our next guest coming to the microphone. Mrs. Ada Kravitz of Ridgewood, Long Island. How do you do, Mrs. Kravitz?

Mrs. KRAVITZ. How do you do, Mr. Baker?

Mr. BAKER. Aren't you warm with that fur coat on?

Mrs. KRAVITZ. Kind of warm.

Mr. BAKER. Take it off.

Ken, would you help the lady off with her coat?

Mr. ROBERTS. Gladly.

Mr. BAKER. What kind of coat is that?

Mrs. KRAVITZ. Persian lamb.

Mr. BAKER. Who bought it for you, hubby?

Mrs. KRAVITZ. Thank God, yes, he did.

Mr. BAKER. Just got my wife a brand new coat, unworn baby stool pigeon she is wearing now.

Mrs. KRAVITZ. Is that a fur?

Mr. BAKER. That is a fur, yes, from fur, who knows. I can't spend all my money on mink every year.

Tell me, Mrs. Kravitz, it says—you do something for a living, what is it—what do you do?

348 Mrs. KRAVITZ. Credit checker.

Mr. BAKER. I will see you later. Credit checker?

Mrs. KRAVITZ. Yes.

Mr. BAKER. Ken Roberts is leaving. Frank Stanton is leaving. Everybody is walking out.

Will you tell us about any funny incident that you can tell us about credit checking?

Mrs. KRAVITZ. Oh, yes.

Mr. BAKER. Tell us one, will you please?

Mrs. KRAVITZ. Someone came to buy something and they put up a big front.

Mr. BAKER. Yes.

Mrs. KRAVITZ. When we tried to collect, there was no front. We checked him from his automobile license, we checked him from his house and home and wherever he was—he lived there, but Annie don't live there any more. Finally, we got him. Yes, he was living in a trailer.

Mr. BAKER. I have a cousin living in a trailer for years. Go ahead.

Mrs. KRAVITZ. When he lives like that, he hasn't got much.

Mr. BAKER. I see.

Mrs. KRAVITZ. Period.

Mr. BAKER. So what happened?

Mrs. KRAVITZ. We were out \$75.

Mr. BAKER. You mean you didn't take the trailer?

Mrs. KRAVITZ. But next year he came back again and I spotted the guy. He didn't get very far the next time, believe me. He was before the judge before he knew it.

349 Mr. BAKER. Is that a fact. I think I saw him on the Kefauver Committee.

All right, Mrs. Kravitz, what have you chosen, please?

Mrs. KRAVITZ. I hope I will do good on No. 2.

Mr. BAKER. No. 2, okay. What is No. 2. That is American history. This is without credit. In each of these questions I will list three people or three things. One of them does not belong. You name the one.

For example, if I said which one of these battles was not fought during the American Revolution, Gettysburg, Bunker Hill, Yorktown, you would say Gettysburg.

Mrs. KRAVITZ. Gettysburg.

Mr. BAKER. Right.

Which one of these men was not a war president, Abraham Lincoln, Grover Cleveland, Woodrow Wilson?

No help, please.

Mrs. KRAVITZ. Grover Cleveland.

Mr. BAKER. No help, please. Thank you very much.

You have a dollar. Here we go for 2. Which one of these explorers was not a native of Spain, Pizzaro, Columbus, Cortez? You will have to speak up.

Mrs. KRAVITZ. Pizzaro.

Mr. BAKER. I'm sorry.

Mrs. KRAVITZ. Cortez.

Mr. BAKER. I'm sorry, you're wrong on both counts. It's Columbus, born in Genoa, Italy. I'm sorry. Stand by.

All right, here is our next guest at the microphone, Mr. Roy Milton. How do you do, Mr. Milton?

Mr. MILTON. Very good, thank you.

350 Mr. BAKER. Step a little closer to the microphone, please.

Senator Tobey would like to speak to you for just a moment. Mr. Milton, it says you're from—where is this, St. John?

Mr. MILTON. St. John, New Brunswick, Canada.

Mr. BAKER. Canada?

Mr. MILTON. Yes.

Mr. BAKER. What are you doing in our fair city?

Mr. MILTON. I'm just down here on a holiday.

Mr. BAKER. On a holiday?

Mr. MILTON. Yes.

Mr. BAKER. How did you come down—by plane?

Mr. MILTON. No, by car.

Mr. BAKER. By car. Your own car?

Mr. MILTON. No, a gentleman I'm with.

Mr. BAKER. Oh, I see. What do you do for a living?

Mr. MILTON. I'm a bus driver.

Mr. BAKER. A bus driver. You didn't drive down in the bus, did you?

Mr. MILTON. No, sir.

Mr. BAKER. Huh?

Mr. MILTON. No, sir.

Mr. BAKER. You remember that fellow who drove to New York from Florida?

Mr. MILTON. Yes.

Mr. BAKER. Did you ever have an inclination to do that?

Mr. MILTON. No. Once I get out of a bus I want to stay out of it.

351 Mr. BAKER. You don't want a busman's holiday, in other words?

Mr. MILTON. That's right.

Mr. BAKER. What have you seen in town; what did you do?

Mr. MILTON. I better not say, the wife may be listening in on the program.

Mr. BAKER. I see what you mean. Where is the Mrs., up home?

Mr. MILTON. I hope.

Mr. BAKER. Do you listen to it up home?

Mr. MILTON. Yes.

Mr. BAKER. Do we have a little following up there?

Mr. MILTON. Oh, yes.

Mr. BAKER. People do listen to the \$64 Question?

Mr. MILTON. Yes.

Mr. BAKER. What is the pound—what is the rate of exchange between the States and Canada?

Mr. MILTON. Buying in Canada, buying American money, when I bought it, it was 53½ cents on the dollar.

Mr. BAKER. 53½ cents on the dollar?

Mr. MILTON. That's right.

Mr. BAKER. I don't understand that. Do you mean our dollar is just worth 53½ cents up there? We'll sever relationship immediately, old boy.

Mr. MILTON. In other words, I mean for one of your dollars I have to pay \$1.05¾.

Mr. BAKER. That is different. Welcome to Take It or Leave It. That is fine.

352 All right, sir, here we go. What is the category you have chosen, please?

Mr. MILTON. I've tried No. 17.

Mr. BAKER. No. 17. Okay, here we go with No. 17: world statesmen, first names. What is the first name of each of these living statesmen for \$1: Eisenhower of the United States, what is the first name?

Mr. MILTON. Ike.

Mr. BAKER. That's sort of his nickname. I will give you that. It's Dwight, you know.

Mr. MILTON. Yes.

Mr. BAKER. Okay. First names for \$2, Auriol of France?

He is visiting with us now. The papers have been full of him, full of the facts that he is in town and he went to Washington.

It gets a little warm up here, doesn't it, son. Driving a bus you have to have pretty good eyesight, don't you? Let's us see if you've got 20/20 vision. Can you see this. If you saw a red light or a green light—

Mr. MILTON. Vincent.

Mr. BAKER. Who told you?

Mr. MILTON. You were a great help.

Mr. BAKER. All right, here we go for \$4. What is his first name, Romulo of the Philippines—Romulo of the Philippines? [Pause]—You don't know? I'm terribly sorry. He's a great statesman. Carlos Romulo.

Better luck next time.

353 All right, here's our next contestant.

Frank, I'll get it right one night. Keep talking in you know.

Mrs. Grace Brown, how do you do?

Mrs. BROWN. How do you do?

Mr. BAKER. I'm very happy to have you with us tonight. Will you step a little closer, please. What is that pin you're wearing? Is that an Eastern Star?

Mrs. BROWN. No, that is a veteran's pin from the Metropolitan Life Insurance Company.

Mr. BAKER. A veteran's pin. What does it signify actually; why were you given this honor?

Mrs. BROWN. Because I worked there for 21 years.

Mr. BAKER. You mean you are a veteran of the Metropolitan Life Insurance Company? You sell life insurance?

Mrs. BROWN. No. I worked in the home office.

Mr. BAKER. Uh huh.

Mrs. BROWN. I am retired from there now. But I did work there for—

Mr. BAKER. Twenty or so years?

Mrs. BROWN. Yes.

Mr. BAKER. And you are insured by Prudential, I suppose?

Mrs. BROWN. Oh, yes, and the Metropolitan, too.

Mr. BAKER. And the Metropolitan, too?

Mrs. BROWN. Yes.

Mr. BAKER. It says you are a dietician.

Mrs. BROWN. They serve lunches to the employees, you know, 14,000 employees.

354 Mr. BAKER. 14,000 employees.

Mrs. BROWN. And these are served in about 16 different units, each one is a separate restaurant. And I was manager or the head—it corresponded to a manager of a restaurant outside, only all the employees eat there.

Mr. BAKER. You sort of framed the menu, as it were?

Mrs. BROWN. Well, we had some part of it. Of course, they had a head dietician and they have a commissar.

Mr. BAKER. What about this guy Hauser, do you know anything about him, Dr. Hauser? Do you like that blackstrap molasses stuff that he goes for?

Mrs. BROWN. I can't go that, I've tried some of his other stuff, but I can't go it.

Mr. BAKER. I can't either. What about yogurt, is that good for you?

Mrs. BROWN. That's very good for you.

Mr. BAKER. You haven't got some yogurt with you in your purse?

Mrs. BROWN. No. But they serve those things, of course.

Mr. BAKER. Why is yogurt so beneficial? What are the vitamins? Is that goat milk?

Mrs. BROWN. No, it's like buttermilk. A good deal like it.

Mr. BAKER. You recommend it, do you?

Mrs. BROWN. For some things. I can't take it. I don't care for it particularly but I can't take it.

Mr. BAKER. I see.

Mrs. BROWN. I really think it's beneficial.

355 Mr. BAKER. You really do?

Mrs. BROWN. Yes.

Mr. BAKER. Then I shall try it.

All right, here we go. What have you chosen, please?

Mrs. BROWN. I was going to take No. 2.

Mr. BAKER. I'm sorry.

Mrs. BROWN. I'll take No. 12, I think.

Mr. BAKER. No. 12. Okay, here we are with No. 12. Presidents' earlier careers. That is a category about what some of our Presidents did before they moved into the White House.

For a dollar, what President was once a haberdasher?

Mrs. BROWN. Truman.

Mr. BAKER. Truman is good. Okay, fine.

Our President has a very tough job, hasn't he?

Mrs. BROWN. He has.

Mr. BAKER. He certainly has. Whenever I'm tempted to criticize President Truman I remember a sign I saw in a saloon out west. It said "Don't throw rocks at the piano player. He's doing the best he can."

All right. Thank you, Democrats.

Here we go for \$2. What President was once a rail splitter?

Mrs. BROWN. Abraham Lincoln.

Mr. BAKER. Abraham Lincoln, that's good. You must do a lot of reading. Do you?

Mrs. BROWN. I used to be a school teacher, too.

Mr. BAKER. Do you ever sit around at night with your nose in a book?

356 Mrs. BROWN. Yes, I used—

Mr. BAKER. Painful, isn't it?

Here we go for \$4. What President was once a president of Princeton?

Mrs. BROWN. Wilson.

Mr. BAKER. Woodrow Wilson; good for you.

All right, for \$8. What President was once a New York police commissioner? I'm going to give you a little hint. He originated the slogan, "Speak slowly and carry a big stick."

Mrs. BROWN. Teddy Roosevelt.

Mr. BAKER. Teddy Roosevelt, that's good. "Speak softly and carry a big stick." Since then no New York policeman has ever

spoken harshly to anyone. And that, kiddies, concludes Uncle Phil Baker's fairy tale for tonight.

For 16, what President was once governor of Massachusetts?

Mrs. BROWN. Coolidge.

Mr. BAKER. Calvin Coolidge, that's good. You can stop, take 16, or try for 32. What do you think? Should the lady try for \$32?

All right, what President was once a tailor?

Mrs. BROWN. Andrew Johnson—Jackson.

Mr. BAKER. Did you know that?

Mrs. BROWN. Yes.

Mr. BAKER. We will try for \$64?

Mrs. BROWN. Yes.

Mr. BAKER. The \$64 question, good luck to you. What President was once an architect? What President was once an architect?

357 Mrs. BROWN. Cleveland.

Mr. BAKER. No. Once an architect. Will you hold this while I pour some coffee, please. What President was once an architect?

Mrs. BROWN. Thomas Jefferson.

Mr. BAKER. Thomas Jefferson gives you \$64.

I'll be back in a moment with the pay-off question. But first here is Ken Roberts with an announcement.

Mr. ROBERTS. Recently one of our largest city's survey of public elementary schools revealed conditions that are hard to believe, children were sitting not only two in a chair, but on the radiators, on the floors or standing in the aisles. They were forced to carry their outer clothing from class to class because of lack of locker space.

These conditions as well as serious fire hazards and teacher shortages are robbing our children of the kind of education they deserve. It is up to parents to know what their local schools are like and to demand the elimination of all these bad features. Get busy in your local PTA and other civic groups to make sure that the children of your town are getting a square deal in school. Remember, America's future lies with its children.

Mr. BAKER. This is Phil Baker again, friends, with the pay-off question. Tonight the pay-off is worth \$86. Remember this is strictly a race. Every contestant has an equal chance. The first one with the correct answer wins the entire pay-off. If a contestant here on our stage gets the correct answer, you will hear a bell. You will have 30 seconds in which to answer. Get ready, here's the pay-off question:

358 Who just won an Academy Award as the best supporting actress?

Hold it. We have an answer from one of our contestants. Who was the winner, Ken?

Mr. ROBERTS. Mrs. Ada Kravitz of Ridgewood, Long Island.

Mr. BAKER. All right, the pay-off question was, "Who just won an Academy Award as the best supporting actress?" What was your actress?

Mrs. KRAVITZ. Josephine Hull.

Mr. BAKER. Josephine Hull is correct, and you win \$86. Congratulations. Thanks for being with us and good luck.

Mr. ROBERTS. This is Ken Roberts saying good night for the \$64 Question.

359 *Exhibit E to amended complaint*

NBC

WHAT'S MY NAME

April 11, 1951, 1:00-1:30 p. m.

360 TED BROWN. NBC Television presents S-p-e-i-d-e-l. Speidel watchbands.

(Chorus. [Singing.] Stop wristwatch shock, stop wristwatch shock, stop wristwatch shock, stop wristwatch shock with Speidel wristwatch bands.)

(Stop wristwatch shock, stop wristwatch shock, stop wristwatch shock, stop wristwatch shock with Speidel wristwatch bands.)

(Speidel.)

Mr. BROWN. Speidel presents our stars, Paul Winchell and Jerry Mahoney, playing What's My Name. [Applause.]

JERRY MAHONEY. Thank you very, very much, ladies and gentlemen.

PAUL WINCHELL. Wait a minute.

JERRY MAHONEY. What?

PAUL WINCHELL. What's with this outfit you're wearing tonight?

JERRY MAHONEY. Don't you know?

Tonight I'm supposed to be a Lepkin.

PAUL WINCHELL. A what?

JERRY MAHONEY. A Liskon—a Lepskun.

PAUL WINCHELL. A Leprechaun?

JERRY MAHONEY. That's what I said, you jerk, a Lepekon.

PAUL WINCHELL. Really?

JERRY MAHONEY. Yes.

PAUL WINCHELL. You know, if you want to be a Lepekon you've got to have the right type of ears.

JERRY MAHONEY. I do?

361 PAUL WINCHELL. Certainly. Let me put these ears on you. Now turn this way.

JERRY MAHONEY. What are you going to do?

PAUL WINCHELL. There's one [putting on false ear].

JERRY MAHONEY. You better put the other one on, I'm lopsided.

PAUL WINCHELL. Just a moment. I'll have them on in a second.

JERRY MAHONEY. Hurry up. Do it right.

PAUL WINCHELL. All right. There you are. Now, how does that feel?

JERRY MAHONEY. Boy, oh, boy, I wish I could wear these ears all the time.

PAUL WINCHELL. Why?

JERRY MAHONEY. It would sure save a lot of washing.

PAUL WINCHELL. Well, how come you're all dressed up? What's the occasion?

JERRY MAHONEY. What's the occasion?

PAUL WINCHELL. Yes.

JERRY MAHONEY. Boy, Winchell, you're "iggorent." That's what you are, "iggorent."

PAUL WINCHELL. What do you mean?

JERRY MAHONEY. Don't you know that St. Patrick's Day is coming up? You ought to be ashamed of yourself.

PAUL WINCHELL. I was only kidding, Jerry. I know it's coming up.

JERRY MAHONEY. You do?

PAUL WINCHELL. Sure. Why, I am all prepared for St. Patrick's Day.

362 JERRY MAHONEY. Really?

PAUL WINCHELL. Listen.

John O'Garde, please.

PAUL WINCHELL (singing). Sure, a little bit of heaven fell from out the sky one day.

JERRY MAHONEY. And it nestled in the ocean in a spot so far away.

PAUL WINCHELL. And when the angels found it, sure, it looked so sweet and fair.

JERRY MAHONEY. They said, "Suppose we leave it, because it looks so peaceful there."

PAUL WINCHELL. Then thy sprinkled it with stardust just to make the shamrocks grow.

JERRY MAHONEY. 'Tis the only place you'll find them no matter where you go.

PAUL WINCHELL. Then they dotted it with silver just to make it look so grand.

JERRY MAHONEY. And when they had it finished, sure, they called it—Ire—they called it——

PAUL WINCHELL. Ireland.

JERRY MAHONEY. Ire——

PAUL WINCHELL. Ire——

JERRY MAHONEY. Ire——

PAUL WINCHELL. Ire——

Jerry MAHONEY. If I sing any higher, my eyes will pop out.

PAUL WINCHELL. Sure, they called it Ireland. [Applause.]

(Musical cue and Winchell dances; singing.)

363 PAUL WINCHELL. Shake hands with Your Uncle Mick, me boy, and this is your Sister Kate, and here's the gal you used to swing, down by the garden gate.

Shake hands with all the neighbors and kiss the colleens all.

JERRY MAHONEY. You're as welcome as the flowers in May—sure, and this song warms the cockles of me heart.

PAUL WINCHELL. In dear old——

JERRY MAHONEY. Donegal. [Applause.]

Mr. BROWN. And now, Paul and Jerry, I want you to meet our first contestant, Adrienne Cooper, of New York City.

Here's your Speidel watchband (handing to contestant). I'm sure you'll know it, and sure, and she's ready for that hundred-dollar bond.

JERRY MAHONEY. Please, pull my dress down. It's very embarrassing.

PAUL WINCHELL. Go ahead and ask the question.

JERRY MAHONEY. You know something, it's good luck when a girl gets kissed by a Lepekon.

(Contestant leans over toward Jerry.)

JERRY MAHONEY. Timber.

PAUL WINCHELL. Wait a minute now. That's not true, Jerry. That's only a myth.

JERRY MAHONEY. Yes? Well, this is the myth I'd like to kiss.

PAUL WINCHELL. Behave yourself.

JERRY MAHONEY. Could I?

(Contestant kisses Jerry.)

364 JERRY MAHONEY. Oh, I can't stand it.

PAUL WINCHELL. Just ask the question.

JERRY MAHONEY. Okay.

Now, in this last number that I just sang, I played the part of the guy who originally introduced "Sure, a little bit of heaven fell from out the sky one day."

PAUL WINCHELL. So, for a hundred-dollar bond, can you tell for Speidel——

JERRY MAHONEY. What's my name? You have one chancey, that's all.

Miss COOPER. Chancey?

JERRY MAHONEY. That's all youve got. That's all you've got, chancey, chancey, chancey, oh.

Miss COOPER. Chauncey O'Hara.

JERRY MAHONEY. That's all you've got.

(Buzzer sounds.)

JERRY MAHONEY. Shall we give it to her? She was close, Chauncey Olcott.

All right, you got it. You was close enough.

PAUL WINCHELL. Okay, you win a hundred-dollar bond, and congratulations.

JERRY MAHONEY. That was for the kiss.

PAUL WINCHELL. All right, Ted Brown.

Mr. BROWN. Okay, Paul.

We'll be back in just a moment with more amusing clues, but right now Don Hancock is waiting with a word by Speidel.

(Speidel watchbands.)

(Stop wristwatch shock with Speidel watchbands. Speidel.)

365 DON HANCOCK. Your watch is old-fashioned without a golden Speidel band. Yes, Speidel bands not only outwear old-fashioned bands like this, but just look, look at the difference in appearance. Here's Speidel's beautiful Cortez for men, rugged, masculine. Look for the name Speidel on the back of every link, and hidden inside are calibrated springs to stop wristwatch shock. Protect the delicate mechanism of your watch.

Speidel Cortez slips on and off the wrist like lightning, too. No unwieldy clasps or buckles, and remember, Speidel's Cortez is the ideal gift for any man on all occasions, costs less than you'd guess, only \$11.95, including federal tax.

So get rid of that old-fashioned watchband. Speidel's magnificent Cortez at jewelers everywhere.

Speidel watchbands.

Mr. BROWN. And now, folks, I want you to meet Orlando Dicenzo of New Canaan, Connecticut.

And here's that beautiful Cortez Speidel watchband that Don Hancock just spoke about.

And watch that screen closely for that one-hundred-dollar bond as Diane Sinclair and Bruce Cartwright with the original composition by John Garde give us the clues as we play What's My Name.

(Diane Sinclair as an Oriental dancer and Bruce Cartwright as a soldier; she dances in front of him and drops poison in his drink; she dances with him and takes a paper from him; then stabs him.)

Mr. BROWN. All right, now.

366 [Applause.]

Mr. BROWN. You have just seen Diane Sinclair portray a famous woman spy whose own career ended with her execution, and so, for the hundred-dollar bond, can you tell for Speidel—

DIANE SINCLAIR. What's my name?

Mr. BROWN. You've got seven seconds. You've got to hurry. No matter what, you've got to Hari.

ORLANDO DICENZO. Mata Hari.

Mr. BROWN. Mata Hari is absolutely correct. You've won a \$100 bond, and congratulations, sailor.

Now, we're going to prove to you that the hand is quicker than the eye. We're going to change contestants right before your eyes without magic and nothing up my sleeve.

What's your name?

CONTESTANT. Bernice Saul.

Mr. BROWN. Watch your screen closely, for that \$100 bond, as Betty Ann Neiman portrays a famous movie star, with music by John Garde, as we play What's My Name.

(Betty Ann Neiman (singing) There's a doctor living in our town. There's a lawyer and Indian, too. Neither doctor, lawyer or Indian chief can love you any more than I do. There's a barrel of fish in the ocean. There are lots of little birds in the blue. Neither fish nor fowl, says the wise old owl, could love you any more than I do. No, no, no, it couldn't be true, that anyone else could love you like I do. No, no, no, no, that anyone else could love you like I do. Like I do. Like I do.)

[Laughter and applause.]

367 Mr. BROWN. All right, Mrs. Saul. First, let me give you this Speidel watchband. Take it back to North Dakota with you, and you have just seen Betty Ann Neiman portray a famous movie star who introduced that song.

So, now, for a \$100 bond, can you tell for Speidel—

BETTY ANN NEIMAN. What's my name?

Mr. BROWN. All right, you've got 10 seconds. I'm sure you know. She's blond, vivacious, and dynamite.

Mrs. SAUL. Betty Hutton.

Mr. BROWN. Betty Hutton is right. And you win a \$100 bond, and congratulations.

Now, if you folks out there would like a chance at that mystery, What's My Name, all you have to do is send your name and address and phone number, and the call letters of the TV show you are watching, to Speidel Show, Box 811, New York 46, New York, and we'll receive your cards. No letters, please, just cards. We'll try to call you and give you a chance at that money.

Our next contestant right now is standing by waiting for a chance at that \$100 bond. Watch closely as Paul Winchell, as-

sisted by Julie Bennett, portrays a famous character from the works of Victor Hugo, as we play *What's My Name*.

(Paris, 1481. Voice: Esmeralda, a Gypsy dancer, was sentenced to be burned as a witch, but she has been miraculously rescued and carried up to the roof of the Cathedral of Notre Dame.)

(PAUL WINCHELL, acting as Quasimodo: I am sorry I am so ugly. You must hide here. You are in the sanctuary of the cathedral. Here no one may seek you. It is the custom; 268 but stir not a step out of Notre Dame or they will catch you and kill you.)

(ESMERALDA. Oh, no, no.)

(WINCHELL. It will be the death of me, too. Don't be afraid. I am your friend. There, now, you don't have to look at me [turning away].)

(ESMERALDA. Why did you save me? Why did you save me from the execution?)

(WINCHELL. Did you speak to me?)

(ESMERALDA. Yes.)

(WINCHELL. You must know that I am deaf. You'd think nothing else was wanting, wouldn't you? As I lay upon the torture wheel, my body gashed by whips, my throat parched for drink, the crowd looking at me, you pitied me. You brought me drink to quench my burning thirst. I've not forgotten. You're so beautiful, a sunbeam, a drop of dew, a bird's song. Never before was I aware of how hideous I am. I must appear to you like a beast, something frightful, neither man nor brute, something loathsome, more shapeless and more like the mud of the streets, a misshapen monster.)

(ESMERALDA. Please.)

(WINCHELL. Here, take this whistle, Esmeralda. When you need me, when you have courage to seek me, whistle that. I shall hear that sound.)

(Esmeralda screams.)

(WINCHELL. They are trying to break into the church. They must not do that. They will defile the sanctuary.)

(ESMERALDA. No.)

(WINCHELL. Do not be afraid, I will protect you. I will break them to pieces. I will dash them to the streets 369 below. I will kill them, kill, kill.) [Applause.]

Mr. BROWN. Now, I want you to meet Paul Winchell. This is George Buchard, New Hampshire, and here's your Speidel Sir Galahad watchband, and I know you will wear it well.

He is all set to talk to you. Don't be frightened of him, now.

PAUL WINCHELL. I got a million of them.

JERRY MAHONEY. Hey, who are you?

PAUL WINCHELL. What?

JERRY MAHONEY. Who are you, who's this creep?

PAUL WINCHELL. Wait a minute.

(Takes off mask of Quasimodo.) (Jerry screams.)

PAUL WINCHELL. Come up here. I have a question to ask.

JERRY MAHONEY. Oh, I'm sorry. Well, how-do-you-do, kid. How are you?

Mr. BUCHARD. Fine, thank you.

PAUL WINCHELL. Look, did you like that little sketch I did about Notre Dame?

JERRY MAHONEY. I didn't care for the Notre, but I sure like the Dame.

PAUL WINCHELL. Now, then, here's the question.

In this sketch I played the famous role of the Hunchback of Notre Dame.

JERRY MAHONEY. Now, for the \$100 bond, can you tell for Speidel—

PAUL WINCHELL. What's my name? I'm sure you know it.

370 JERRY MAHONEY. What's the name? It doesn't motto—matter, if you don't know. [Buzzer sounds.]

PAUL WINCHELL. Oh, I'm terribly sorry, but the Hunchback's name was Quasimodo.

Anyway, you get a \$25 bond and a beautiful Speidel watchband.

JERRY MAHONEY. And thank you very much for helping us out. See you later.

PAUL WINCHELL. Okay, Ted Brown.

Mr. BROWN. Okay, Paul.

We'll be back in just a moment with the mystery What's My Name, but first, here's Don Hancock with a word about Speidel.

(Stop wristwatch shock with Speidel wristwatch bands. Speidel.)

DON HANCOCK. Every man and woman knows style in clothes does make a difference. Yes, what a difference, and style is just as important in your watchband. Just look, see how Speidel's beautiful Golden Harvest dresses up a watch, makes it look like new again. Speidel's Golden Harvest is an exquisite bracelet designed of golden shafts of wheat that is truly stunning, truly eye-arresting, has calibrated springs, stops wristwatch shock, slips up your wrist conveniently when washing hands, dishes, baby's things.

Yes, wherever you go, you'll be proud you're wearing Speidel's Golden Harvest. Feminine, graceful, always in style.

Don't be satisfied with anything less than Speidel for yourself or as a gift.

371 Ask your jeweler for Speidel's Golden Harvest. Only \$10.95, including federal tax.

Mr. Brown. And now the mystery What's My Name.

Each week the money missed by our contestants is put to the grand prize, which tonight totals \$700 in bonds, and one of you viewers out there has got a chance to win that if you can answer this next question correctly. Our operators have someone on the phone right now. [Picks up the phone.]

Hello, Virgil M. Austin, Hyattsville, Maryland.

All right now, watch your screen closely for \$700 in bonds, as Paul Winchell and Jerry Mahoney give us the clues to the Mystery What's My Name.

Winchell and Mahoney, private eyes.

VOICE. Tonight we bring you another escapade from the files of those two master detectives, Paul Winchell and Jerry Mahoney.

JERRY MAHONEY. My partner and I are private eyes, and my pal Winchell is a great detective. He's got the strength of a watchdog, the mind of a bloodhound, and the face of a cocker spaniel.

PAUL WINCHELL. Come on, cut it out.

JERRY MAHONEY. Why don't you answer the telephone?

PAUL WINCHELL. Well, it didn't ring yet.

JERRY MAHONEY. Are you going to wait until the last minute?
[Telephone rings.]

JERRY MAHONEY. I'll get it.

Hello.

WOMAN'S VOICE. Save me, save me.

372 JERRY MAHONEY. Take it easy, lady. I can hear you.

VOICE. A monster is chasing me with a knife.

JERRY MAHONEY. I can't hear you.

VOICE. A monster is chasing me with a knife.

JERRY MAHONEY. I can't hear you.

PAUL WINCHELL. Well, I can hear her.

JERRY MAHONEY. Then you go save her. [Laughter.]

PAUL WINCHELL. Give me that telephone.

VOICE. Hello, this is Mrs. Van Snort. My jewels have been stolen. My husband has been shot. My brother has been strangled. My nephew has been stabbed. My sister has been poisoned—

JERRY MAHONEY. So, how's the family? [Laughter.]

PAUL WINCHELL. Hello, Mrs. Van Snort. Do you have any idea who did it?

VOICE. Yes, it was the skinny man.

PAUL WINCHELL. The skinny man?

VOICE OF SKINNY MAN. You heard her, copper.

PAUL WINCHELL. Wait a minute, who is this?

VOICE OF SKINNY MAN. The skinny man. [Screams and sound of falling down.] [Laughter.]

VOICE OF SKINNY MAN. Sit up, you jerk. Now, listen. You stay out of this or you'll get killed.

PAUL WINCHELL. Yes. Well, we're not afraid of you, Skinny Man.

VOICE OF SKINNY MAN. Oh, no?

373 PAUL WINCHELL. No.

VOICE OF SKINNY MAN. Here's a sample. [Shot knocks Winchell's hat off.] [Laughter.]

PAUL WINCHELL. What am I going to do?

JERRY MAHONEY. Control yourself.

PAUL WINCHELL. Jerry, he said he would kill me.

JERRY MAHONEY. Winchell, take it easy. Your nerves are getting shot.

PAUL WINCHELL. I'm too young to die.

JERRY MAHONEY. There's a shot of liquor and a chaser. Drink it and you'll feel better.

PAUL WINCHELL. Yes, okay. [Drinking from glass.]

JERRY MAHONEY. Now, drink the liquor. [Laughter.]

PAUL WINCHELL. Suddenly I realized I had the case cracked wide open. [Laughter.]

PAUL WINCHELL. I read in the paper once in order to get skinny, go to the Turkish bath. So we decided to go over to the Turkish Bath, because we were out to get skinny, and we figured if we kept our eyes opened, we might learn something.

JERRY MAHONEY. Yes, especially since it was ladies' night. [Laughter.]

(Turkish bath.)

ACTRESS B. Boy, these jewels are gorgeous.

ACTOR A. Sure, the Van Snorts only buy the best.

ACTRESS B. Hey, get out of here, this is the ladies department.

374 ACTOR A: Don't worry, baby. Nobody comes in here.

FEMALE VOICE. Attention, two ladies coming up.

ACTOR A. Quick, we've got to hide the jewels.

ACTRESS B. Give them to me. I'll put them in the steam cabinet.

ACTOR A. Yes, I'll get out of here. Take it easy. Don't worry. (Winchell and Mahoney enter dressed as ladies.)

JERRY MAHONEY. A pretty girl is like a melody.

PAUL WINCHELL. Isn't this a lovely place, Tallulah?

JERRY MAHONEY. Yes, darling. It's — [Screams]

ACTRESS B. Excuse me, ladies, what can I do for you?

JERRY MAHONEY. Well, nothing for me at all, dearie, but my girl friend here wants to reduce. Don't you, Daisy?

PAUL WINCHELL. Yes, I would. Oh, yes, I mean —

JERRY MAHONEY. She means she wants to reduce, fatso.

ACTRESS B. Fatso—I'll have you know I'm a perfect 32.

JERRY MAHONEY. Would you care to loosen your girdle and try for 64? [Laughter.]

PAUL WINCHELL. Tallulah darling, you must remember, dear, her weight is her business.

JERRY MAHONEY. Well, she sure has been in business a long time. [Laughter.]

ACTRESS B. You mean —

(Actress B leaves.)

375 PAUL WINCHELL. Suddenly I realized I had the case cracked wide open. [Laughter.]

PAUL WINCHELL. I had a hunch that the skinny man was here, and we would catch him even though he was slippery and as slim as an eel.

JERRY MAHONEY. Yes, he was a slippery schlemiel. [Laughter.]

JERRY MAHONEY. Do you see him anywhere?

PAUL WINCHELL. No, I don't see him. [Screams.]

JERRY MAHONEY. 'E gads, a man. How dare you come in here. What kind of a joint is this?

ACTOR A. Hello, cutie pie.

JERRY MAHONEY. Fresh. Oh, I'll give you such a knop.

ACTOR A. Would you like to go out with me Thursday night?

JERRY MAHONEY. I'm sorry, kid, I'm getting married Thursday night.

ACTOR A. Oh.

JERRY MAHONEY. How about Friday night?

ACTOR A. What?

JERRY MAHONEY. I mean, I'm looking for a skinny man.

PAUL WINCHELL. Shut up.

ACTOR A. What? Oh, there's a couple of coppers looking for the skinny man, too.

PAUL WINCHELL. Coppers?

ACTOR A. One is tall and one is short.

JERRY MAHONEY. Short?

376 ACTOR A. If I ever see the short one, I'll let him have it.

PAUL WINCHELL. Where are you going, Tallulah?

JERRY MAHONEY. Shut up, shorty.

PAUL WINCHELL. Excuse me, we must leave now.

ACTRESS C. All right, ready, line up for our exercise.

PAUL WINCHELL. But you don't understand—

ACTOR A. Line up.

JERRY MAHONEY. Hey, you want a sock?

ACTOR A. Yes.

JERRY MAHONEY. What size do you wear? [Laughter.]

ACTRESS C. All right now, our exercises. Bend the knees. Down up, down up, down up, down up.

JERRY MAHONEY. I'm going the wrong way. You're going the wrong way.

ACTRESS C. Point the toes, 1, 2.

JERRY MAHONEY. What'll we do.

ACTRESS C. 3, 4.

JERRY MAHONEY. Let's make for the door.

ACTRESS C. 5, 6.

JERRY MAHONEY. Nix, nix.

ACTRESS C. 7, 8.

JERRY MAHONEY. Oh, this is great.

ACTRESS C. 9, 10.

JERRY MAHONEY. He's in again.

ACTRESS C. 11, 12.

PAUL WINCHELL. [Dancing.] 13, 14, 15, 16.

377 JERRY MAHONEY. Hey, you're choking me. Cut it out. Hey, Daisy.

PAUL WINCHELL. Yes, darling.

JERRY MAHONEY. Your neckline just plunged. [Laughter.]

JERRY MAHONEY. Tennis, anyone?

(Actor A shoots gun and chases Winchell and Mahoney away.)

PAUL WINCHELL. Where are they?

JERRY MAHONEY. Let's get in the steam box.

PAUL WINCHELL. Okay, you get in first.

(Both climb in steam cabinet.)

PAUL WINCHELL. Are you okay?

JERRY MAHONEY. Yes.

(Actor A gets in steam cabinet.) [Laughter.]

(Actress C gets in steam cabinet.)

(Actress B gets in steam cabinet.)

(From inside cabinet. Wait a minute. Next stop Times Square, change for Coney Island.)

PAUL WINCHELL. [Head sticking out of cabinet.] Suddenly I realized I had the case cracked. All right, you, I've had enough of this nonsense. Now come out of there, all of you. That aboy, come on out and put your hands up, and keep them up. Up against that wall, Come on, you two, all of you, every one of you. Got you all single-handed.

Wait a minute, where is Jerry? Jerry, where are you? Jerry, where are you? What's this [looking in steam cabinet and pulling out thin cardboard strip made to look like
378 Jerry Mahoney]. [Laughter.]

JERRY MAHONEY. Wait a second. I'm okay now, Winch.

PAUL WINCHELL. There they are, kid. I got them all.

JERRY MAHONEY. Did you get the skinny man there?

PAUL WINCHELL. Yes.

JERRY MAHONEY. Where is he?

PAUL WINCHELL. Right over there [points to Actor A].

JERRY MAHONEY. Are you kidding, that ain't the skinny man.

PAUL WINCHELL. No? [Puncturing balloons under the coat of Actor A.]

ACTOR A. I'll get you for this. [Laughter.]

PAUL WINCHELL. Well, folks, that ended the case of the skinny man.

JERRY MAHONEY. Yes, and you know something, we knew that he was full of hot air all the time.

Good night, Martin.

JERRY MAHONEY. Good night, sweetheart. [Applause.]

MR. BROWN. All right, Mrs. Virgil M. Austin of Hyattsville, Maryland, you've just seen the clues. Now I want you to talk to Paul Winchell and Jerry Mahoney, and here they are.

PAUL WINCHELL [Picking up phone.] All right, here's what we want you to guess. Now, I did a takeoff with Jerry of Martin Kane, Private Eye.

JERRY MAHONEY. Now, we want to know the name of the
379 actor who does Martin Kane on television.

PAUL WINCHELL. So, for the grand total of \$700 in bonds—

JERRY MAHONEY. Can you tell for Speidel—

PAUL WINCHELL. What's my name? [Contestant answers.]

PAUL WINCHELL. Who? [Contestant answers again.]

PAUL WINCHELL. William Gargen is absolutely right.

JERRY MAHONEY. You win the prize.

PAUL WINCHELL. The mystery \$700 What's My Name jackpot. Now, folks, here's a few words from Don Hancock about Speidel.

JERRY MAHONEY. He got it right, didn't he?

PAUL WINCHELL. Yes.

(Speidel watchbands. Stop wristwatch shock with Speidel watchbands. Speidel.)

DON HANCOCK. Men, your watch can never look its best or be its best without a golden Speidel band. Just look at the difference. See how Speidel's Sir Galahad sets off your watch, makes it look like new again, bold and masculine with a rugged and strikingly handsome curved chain design.

On the back of every link you will see this name, Speidel, your assurance that inside every link are calibrated springs to stop wristwatch shock, protect the delicate mechanism of your watch.

Speidel watchbands slip on and off of the wrist like magic, no awkward buckles.

380 A Speidel band is a real investment. No fine watch should be without its beauty. It's perfection. See Spei-

del's Sir Galahad at your jeweler tomorrow. Only \$12.95, including federal tax.

Speidel watchbands.

Ladies and gentlemen, I want to thank you very, very much.

JERRY MAHONEY. Wait a second, knucklehead. I'm working, too, you know.

PAUL WINCHELL. I'm sorry, excuse me.

JERRY MAHONEY. Oh, It gets so warm up here (wiping forehead).

PAUL WINCHELL. We are indeed happy that the jackpot was won tonight and I'd also like to tell you that that's about all the time we have now, so in the meantime—we've got to go now, hope you've liked our show.

JERRY MAHONEY. You can join us—it's something that we want you all to know—go ahead, tell them.

PAUL WINCHELL. Me?

JERRY MAHONEY. Yes.

PAUL WINCHELL. We'll be back next week. Please don't forget.

JERRY MAHONEY. To turn on your television set.

PAUL WINCHELL. We've got to go now,—

JERRY MAHONEY. It's been a lot of fun. [Applause.]

381

Exhibit F to amended complaint

NBC

DOUBLE OR NOTHING

April 3, 1951, 2:00-2:30 p. m.

382

Mr. LOU CROSBY. Stay tuned for Double or Nothing.
Produced and transcribed in Hollywood.

It's refreshing, it's healthful and delicious. It's V-8 vegetable juices.

V-8, you know, is not just one juice, but a delicious blend of 85 juices from garden-fresh vegetables, no wonder V-8 has a lively flavor and wholesome goodness no single juice can match. V-8 is a great pepper-upper. Serve it often with meals and between. Your family will love V-8. Try it today. V-8 vegetable juices.

Campbell Soup presents Double or Nothing, starring Walter O'Keefe.

Have soup for lunch. Yes, every day 27 million Americans have soup for lunch. It's quick to fix, nourishing and so delicious. Often we have Campbell vegetable soup, a regular market basket of garden vegetables in homey beef stock. Hmm, hmm, good. Have it soon, Campbell's vegetable soup for lunch.

Here now is Double or Nothing.

Your paymaster of ceremonies, Walter O'Keefe.

Mr. O'KEEFE. Thank you, thank you very much, ladies and gentlemen, for such a hearty welcome.

Greetings to all of you around the country and in case it has escaped your attention, this happens to be one of those officially designated special weeks. You know, like "Be Kind to Animal Week," eat an animal or eat an apple a day.

Yes, I got that better than I thought, you know.

This one has just been named "Be Kind to Your Wife Week."

383 No, now wait a minute. I think we should pay a sincere tribute to wives in general. After all, a wife is someone who helps her husband through troubles and trials and worry and aggravation that he never would have gotten into if he hadn't married her in the first place.

We have a very gay soul coming up to the microphone, born in Rotterdam, Holland.

Mrs. MUSHINSKY. Rotterdam.

Mr. O'KEEFE. Rotterdam?

Mrs. MUSHINSKY. Rotterdam, yes.

Mr. O'KEEFE. I thought it was Rotterdam.

Mrs. MUSHINSKY. No, it sounds like you're cursing me, if you say it that way.

Mr. O'KEEFE. All right, then let us clean it for good, Rotterdam.

Mrs. MUSHINSKY. Rotterdam.

Mr. O'KEEFE. Rotterdam?

Mrs. MUSHINSKY. That's right.

Mr. O'KEEFE. Your name is Mrs. Joanne Mushinsky?

Mrs. MUSHINSKY. That's right.

Mr. O'KEEFE. And you have three children and one grandchild?

Mrs. MUSHINSKY. Yes, and a husband.

Mr. O'KEEFE. You have a husband. I will tell you one thing, Joanne, that husband has got a wife, believe me, and quite a gal, Joanne.

You have got three children, one grandchild and you run a general store?

384 Mrs. MUSHINSKY. Yes.

Mr. O'KEEFE. Where?

Mrs. MUSHINSKY. Green Valley.

Mr. O'KEEFE. What do you sell?

Mrs. MUSHINSKY. Gas, oil, beer, wine, notions, drugs, and Campbell's products.

Mr. O'KEEFE. Thank you very much for putting in the plug.

But the second thing you said, gas, earl—

Mrs. MUSHINSKY. Oil.

Mr. O'KEEFE. I thought maybe coming from Holland you spent a year or two in Brooklyn, that is the way it sounded.

Mrs. MUSHINSKY. Chicago.

Mr. O'KEEFE. Chicago, I see.

I would like to know this Joanne, you are a person of great joie de vivre, shall I say?

Mrs. MUSHINSKY. You speak French, huh?

Mr. O'KEEFE. No, but I know that much, Joanne.

You have great joie de vivre and great bounce and I would like to know how you met your husband, because I don't think anything ordinary ever happened to you.

Mrs. MUSHINSKY. Never.

Mr. O'KEEFE. I didn't think so. How did you meet your husband?

Mrs. MUSHINSKY. I picked him out of the water.

Mr. O'KEEFE. You were sort of a mermaid?

Mrs. MUSHINSKY. I never asked him.

Mr. O'KEEFE. You pulled him out, and let me ask you
385 this, how long after you pulled him out of the water soaking wet did you get him carried to yourself?

Mrs. MUSHINSKY. This happened the seventh of July, about four months.

Mr. O'KEEFE. Four months?

Mrs. MUSHINSKY. Yes.

Mr. O'KEEFE. What kept him out of your grasp for so long, you're a dynamic, magnetic woman, how could he resist you?

Mrs. MUSHINSKY. I have often wondered.

Mr. O'KEEFE. Joanne dear, how old are these kids of yours? I see you have one grandchild.

Mrs. MUSHINSKY. I have one 21, and one 17 and one 8.

Mr. O'KEEFE. What do they do, what does the 21-year-old one do?

Mrs. MUSHINSKY. She's the married one.

Mr. O'KEEFE. She's the married one?

Mrs. MUSHINSKY. That's right.

Mr. O'KEEFE. Your grandchild is your pride and joy?

Mrs. MUSHINSKY. Oh, and how, he is a year old.

Mr. O'KEEFE. Is he working yet?

Mrs. MUSHINSKY. Oh, he comes around to the store and messes things up.

Mr. O'KEEFE. I know.

Let me ask you this, Joanne, let me ask you this: Let's say you won \$40 or \$120, like people do frequently on this program, what would you do with the money?

Mrs. MUSHINSKY. Oh, I never count my chickens until they are hatched.

386 Mr. O'KEEFE. All right, let's try for some chickens with you.

What is your favorite kind of Campbell soup, Joanne?

Mrs. MUSHINSKY. My favorite kind, I like the mushroom soup.

Mr. O'KEEFE. The cream of mushroom?

Mrs. MUSHINSKY. Oh, yes.

Mr. O'KEEFE. We'll send you a 50-carton with the sponsor's compliments.

We have a grand slam question, the nearest answer wins you 80 bucks here.

After one day's exposure of sailors' eyes to the sun, how efficient in percentage is their vision at night? How much has he lost of his complete effectiveness?

Mrs. MUSHINSKY. I will have to join the navy and find out.

Mr. O'KEEFE. If you join the navy—

Mrs. MUSHINSKY. I would say about 40 percent.

Mr. O'KEEFE. Thank you, Joanne.

What category have you chosen?

Mrs. MUSHINSKY. Well—

Mr. O'KEEFE. Wouldn't you love to have her join the navy? I would love to see you in those kind of pants sailors wear.

Joanne, you're going to take the category having to do with famous fliers?

Mrs. MUSHINSKY. Yes.

387 Mr. O'KEEFE. I'm going to read you some short verses about different famous fliers and you're supposed to tell me the name of the flier.

For \$2 Campbell Soup says: Orville and Wilbur in 1903 were the brothers who started the flying spree. Lots of people came around to gawk when they started to fly at Kittyhawk. What was the name of those fellows?

Mrs. MUSHINSKY. The Wright brothers.

Mr. O'KEEFE. That's it.

The \$4 question for Campbell Soups: He flew the Atlantic without a stop, from New York to Paris was Lucky's hop, the Lone Eagle he called his plane, and it brought him lots and lots of fame.

Mrs. MUSHINSKY. Charles Lindbergh.

Mr. O'KEEFE. Right.

The \$6 question for Campbell's Soup: In 1938 this man took a notion to fly across the Atlantic Ocean. He landed in Dublin, scratching his head, "I am looking for sunny California," he said.

Mrs. MUSHINSKY. "Wrong Way" Corrigan.

Mr. O'KEEFE. That's the guy.

You certainly know your poetry, don't you?

Mrs. MUSHINSKY. That's about as far as I know it too.

Mr. O'KEEFE. Campbell's Soup—you know, you make my day's work so easy.

The \$10 question for Campbell's Soup: This is the flyer who was an ace and for his men he set quite a pace, his squadron was called "The Hat in the Ring." In combat they weren't
388 afraid of a thing. He is now the President of Eastern Air Lines, a hero on a raft.

Mrs. MUSHINSKY. The Flying Tiger—no, Rickenbacker.

Mr. O'KEEFE. Would you like double or nothing?

Mrs. MUSHINSKY. I will go double or nothing.

Mr. O'KEEFE. Have you ever lost before?

Mrs. MUSHINSKY. I wouldn't know what. I can't even lose weight.

Mr. O'KEEFE. For \$20, Campbell Soup says: This man flew north to the land of snow and reached a point called Point Barrow—well what scansion we have here—Will Rogers was his passenger friend, and on this trip they met their end. What was his name? You can keep posted on things like this.

Mrs. MUSHINSKY. Wiley Post.

Mr. O'KEEFE. That's it, Wiley Post.

For \$40, Campbell Soups says: This lady was a pilot skilled, her fond public she often thrilled. She vanished a number of years ago while flying over the Pacific so low.

Mrs. MUSHINSKY. Amelia Earhart.

Mr. O'KEEFE. You have won 40 bucks, congratulations.

Now, Lou Crosby.

Mr. CROSBY. Today, Walter, I was told not to say anything about that hearty and nourishing soup that is almost a meal in itself, Campbell's vegetable soup.

Mr. O'KEEFE. Who told you not to say anything?

Mr. CROSBY. Mr. Piper, my grocer.

Mr. O'KEEFE. Does he sponsor this show?

389 Mr. CROSBY. No, Walter.

Mr. O'KEEFE. Does he make Campbell's vegetable soup?

Mr. CROSBY. No.

Mr. O'KEEFE. Well, then—

Mr. CROSBY. But he does sell it, Walter, he sells so much Campbell's vegetable soup he really has to work keeping up with the demand. Because the smart housewives who patronize his store know Campbell's vegetable soup is so delicious, every bit as delicious as the best home kind and they know Campbell's vegetable soup is nourishing, too, almost a meal in itself, made with more than a dozen ripe garden vegetables mingled in homey beef stock and seasoned to perfection.

Hmm, hmm, good. So you gals listening, today get a few extra cans of Campbell's vegetable soup.

Mr. O'KEEFE. A gentleman of distinction comes to the microphone now. He comes originally from Montana, St. Ignatius, Montana.

Now, a visitor, in the person of Jim Kearns.

Jim, we are glad to have you here.

Mr. CROSBY. Welcome to Double or Nothing.

Mr. O'KEEFE. You, keeping to my notes, are manager of the Rainbow Angling Club?

Mr. KEARNS. That's right, Walter.

Mr. O'KEEFE. I wish I met you there sometime, Jim, I have been there about three times, I think, with my boys and I hope some day I meet you there.

Mr. KEARNS. I hope to see you.

390 Mr. O'KEEFE. I hope to see you and I hope you tell me how to catch some fish.

Mr. KEARNS. That is what my job is.

Mr. O'KEEFE. You were sergeant in the Marine Corps?

Mr. KEARNS. At one time.

Mr. O'KEEFE. Were you captured?

Mr. KEARNS. I was captured on Corregidor over on the Philippines.

Mr. O'KEEFE. You were held prisoner how long?

Mr. KEARNS. Three and a half years.

Mr. O'KEEFE. Three and a half years?

Mr. KEARNS. Yes.

Mr. O'KEEFE. What did they make you do, Jim?

Mr. KEARNS. Well, a little bit of everything. Mainly the mining work, after they moved us to Japan and we worked in a mine.

Mr. O'KEEFE. You have never had any experience in that work before?

Mr. KEARNS. No, I am sorry I didn't.

Mr. O'KEEFE. Were you married at that time?

Mr. KEARNS. Yes, I was.

Mr. O'KEEFE. How did you meet Mrs. Kearns?

Mr. KEARNS. Over a cocktail table, Walter.

Mr. O'KEEFE. That's a nice way to meet her. I can just see her floating there and you're sitting down.

What's this about your having been a barber at one time, Jim?

Mr. KEARNS. Well, that was where I got my college degree.

891 Mr. O'KEEFE. What do you mean, you worked your way through college?

Mr. KEARNS. No, I graduated from college.

Mr. O'KEEFE. From a barber college?

Mr. KEARNS. A barber college, that's right.

Mr. O'KEEFE. Look, what did you charge for a clip.

Mr. KEARNS. That was 25 cents.

Mr. O'KEEFE. Did you give away the bandages that went with that?

Mr. KEARNS. No, that was a long time ago.

Mr. O'KEEFE. 25 cents a clip and for a double job, what would you charge?

Mr. KEARNS. 40 cents.

Mr. O'KEEFE. That's when you did both sides of the head.

I would like to have you win some money. What's your favorite kind of Campbell soup?

Mr. KEARNS. Tomato.

Mr. O'KEEFE. Tomato—we'll send you a gift carton with the sponsor's compliments and here is the \$80 grand slam question.

After one day's exposure of sailors' eyes to the sun, how efficient in percentage is their vision at night?

Mr. KEARNS. I would say, just guessing, 94 percent.

Mr. O'KEEFE. 94 percent. All right, James,

Here's your chance to make money and you picked the category. I understand, that has to do with how your wristwatch works.

392 Mr. KEARN. That's night.

Mr. O'KEEFE. For \$2 Campbell Soup says this: The part of the winder and the part of the plant in your garden have the same name.

Mr. KEARNS. Stem.

Mr. O'KEEFE. The \$4 question for Campbell Soups: The coil wire, usually about two feet long, when straightened out, is called what?

Mr. KEARNS. Mainspring.

Mr. O'KEEFE. The \$6 question for Campbell Soups: What wheel actually regulates the movement of the clock?

Mr. KEARNS. Balance wheel.

Mr. O'KEEFE. Now you come to the \$10 question for Campbell Soup: From the mainspring the power travels to a series of four wheels, these four wheels collectively are called what? The Atchison, Topeka, and the Santa Fe.

Mr. KEARNS. The train.

Mr. O'KEEFE. The train, yes. I gave you the answer. I didn't realize it. I apologize for helping you win this money.

Mr. KEARN. Thank you very much, Walter.

Mr. O'KEEFE. Do you want to split it with me? I didn't think so. Thank you.

Double or nothing, you want to go double or nothing?

Mr. KEARNS. Surely.

Mr. O'KEEFE. For \$20 Campbell Soup says: Inside the balance wheel is a very thin coil of steel wire called the what?

393 Mr. KEARNS. Hair spring.

Mr. O'KEEFE. Right. For \$40, double or nothing, Campbell Soups says: The train moves what on the face of the watch?

Mr. KEARNS. The hands.

Mr. O'KEEFE. You have won \$40. Congratulations, Mr. Kearns.

Our next contestant will tackle our next question in just a moment.

Mr. CROSBY. This concludes the first half of Double or Nothing brought to you by Campbell's vegetable soup.

Yes, eat hearty with Franco-American Spaghetti. Now with the second half of Double or Nothing brought to you by Franco-American Spaghetti, the hearty dish that makes you eat hearty.

Listen for the grand slam finish in the Franco-American sweepstakes and here's our paymaster of ceremonies, Walter O'Keefe.

Okay, O'Keefe.

Mr. O'KEEFE. Now, we have a gentleman who has been fighting the war in the navy for nine months, in the person of Admiral Harry Hugh.

Admiral, we are delighted to have you here.

Mr. HUGH. It is a pleasure indeed, sir.

Mr. O'KEEFE. You are known as a seaman apprentice at this point?

Mr. HUGH. That's right, sir.

Mr. O'KEEFE. Which is how high up from the bottom when you start in the navy?

394 Mr. HUGH. Not very high. I will give you a clue.

Mr. O'KEEFE. Not very high. Let me ask you this, you come from a town with a fascinating name, Tombstone, Arizona?

Mr. HUGH. Right.

Mr. O'KEEFE. From Tombstone, Arizona, you went into the navy and your job is a what, you're a cook striker?

Mr. HUGH. That's right.

Mr. O'KEEFE. I know what a cook is, but what's a cook striker?

Mr. HUGH. We don't strike the cooks, I mean it's trying to learn how to cook chow navy way.

Mr. O'KEEFE. You have a girl friend?

Mr. HUGH. Yes, I have.

Mr. O'KEEFE. I would love to know how you met her, Harry Hugh.

Mr. HUGH. Well, it was quite fascinating. I'm still thrilled by it when I think of it.

Mr. O'KEEFE. Good. I am glad to hear that.

Mr. HUGH. You see, I did a little mining back in Arizona and I met her in a mine in the mountains.

Mr. O'KEEFE. What were you doing?

Mr. HUGH. I was going up toward the mine, see, and she was coming down the other way.

Mr. O'KEEFE. What was she doing in the mine?

Mr. HUGH. She was cooking up for the rest of the miners.

Mr. O'KEEFE. I see.

Mr. HUGH. It was a very high range we were walking across and a very narrow trail, sec. I happened to be going
395 one way and she happened to be coming the other.

Mr. O'KEEFE. For heaven's sake.

Mr. HUGH. It was too much trouble to bypass, so I just figured I would tag along.

Mr. O'KEEFE. So you chased her?

Mr. HUGH. No, no, I didn't have to. Well——

Mr. O'KEEFE. Did you put your brand on her, Harry?

Mr. HUGH. Quite.

Mr. O'KEEFE. Do you plan to get married?

Mr. HUGH. I do.

Mr. O'KEEFE. Good.

By the way, we are sending you a gift carton of Franco-American products. Remember, eat hearty with Franco-American Spaghetti.

Here's the grand slam question. After one day's exposure of sailors' eyes to the sun, how efficient in percentage is their vision at night; what is your guess?

Mr. HUGH. I would say about 90 percent.

Mr. O'KEEFE. 90 percent. Thank you Harry.

What category?

Mr. HUGH. Six.

Mr. O'KEEFE. Six, all right.

Franco-American offers you these things. What's your hobby? The 1951 Hobby Show is under way in Los Angeles at the Shrine Convention Hall. Here's the \$2 question for Franco-American.

Here's one. Oh, boy, this is a tough one. Courtesy of the Hobby Show, collecting streetcar tokens.

Now, what is this hobby called, is it called vanity, is it called vestirestry [sic] or vegetarianism?

396 Mr. HUGH. Vestirestry or whatever you call it.

Mr. O'KEEFE. I'll bet Noah Webster is whirling in his grave.

The \$4 question for Franco-American, if you are a lapidary what do you do?

Mr. HUGH. Interested in precious stones.

Mr. O'KEEFE. Earthenware, porcelain potter. If you were interested in the art of making such things, what would your hobby be, would it be sobriety, would it be ceramics, or serenity?

Mr. HUGH. Ceramics.

Mr. O'KEEFE. Ceramics, that's right, good.

What was that first word, vestirestry?

Mr. HUGH. That's right.

Mr. O'KEEFE. The \$10 question for Franco-American, if coleoptera fascinates you, what are you interested in, beagles, beetles or bugles?

Mr. HUGH. Beetles.

Mr. O'KEEFE. Gee, you certainly know these things, Harry. You're certainly using my head.

The \$20 question for Franco-American, what is the hobby indulged in by a collector of coins and medals called is it numerology, numismatology or neurology?

Mr. HUGH. Numismatology.

Mr. O'KEEFE. That is it. What was it again?

Mr. HUGH. Numismatology.

Mr. O'KEEFE. Numismatology, that is it.

The \$40 question for Franco-American, FDR was famous for his hobby, philately, what did he collect—Mr. Roosevelt?

397 Mr. HUGH. Stamps.

Mr. O'KEEFE. You have won 40 bucks. Congratulations.

This is a fix all you ladies were probably in at one time or another.

Mr. CROSBY. Yes, ma'am, you can shop as late as you want to and still have a good hearty supper, piping hot and ready for the family.

Just serve Franco-American Spaghetti. It's so hearty you don't need much else for a completely satisfying meal and the taste is so good everybody will eat heartily, for Franco-American is the very finest spaghetti, tender-cooked in a delicious sauce of ten choice ingredients, including vine-ripened tomatoes and well-aged Cheddar cheese. It's thrifty, too, costs only pennies a portion and quick to fix. Say, you just heat and eat hearty.

Mr. O'KEEFE. Only a couple of contestants ago we had the dramatic story of a gentleman named Kearns who was captured by the Japanese on Corregidor and here we have a lad, he comes originally as a citizen of Rumania. He has been in the United States from Germany for 20 months, he has been in the army six months, and his name, Private Otto Wellman, and Otto, we are glad to have you.

Otto, what were you doing in Germany?

Mr. WELLMAN. I was working in a concentration camp. We had very hard labor.

Mr. O'KEEFE. A concentration camp?

Mr. WELLMAN. That's right, sir.

Mr. O'KEEFE. Well, I'm awfully glad you came out of it as healthy—you look fine, you look strong, you must have
398 recovered your health that you lost there and I would like to ask you this, how come when you got to America you went into the army so fast?

Mr. WELLMAN. Well, sir, I was liberated by the United States Army in concentration camp and I felt very grateful for that fact, and besides, I was working for the army in Germany after the war and I liked it very much and I felt that way I can be grateful to the country.

Mr. O'KEEFE. Thank you very much, Otto.

Your job, according to my spies, at present is an army scout?

Mr. WELLMAN. That's right.

Mr. O'KEEFE. Exactly what does an army scout do?

Mr. WELLMAN. I am supposed to go ahead of the infantry and find out what the enemy does, and I hope my different language knowledge will help in that—

Mr. O'KEEFE. Will happen to be helpful?

Mr. WELLMAN. Yes.

Mr. O'KEEFE. How many languages do you speak?

Mr. WELLMAN. I speak Hungarian, Rumanian, German and English.

Mr. O'KEEFE. Oh, isn't that too bad, you must get confused at times, Otto.

Let me ask you this, you are not a married man yet, Otto?

Mr. WELLMAN. No.

Mr. O'KEEFE. How old are you?

Mr. WELLMAN. 23.

399 Mr. O'KEEFE. 23?

Mr. WELLMAN. Yes.

Mr. O'KEEFE. Have you got a girl friend?

Mr. WELLMAN. I sure have, quite a few.

Mr. O'KEEFE. In how many languages?

Mr. WELLMAN. In almost every one.

Mr. O'KEEFE. Otto, you seem a very well-adjusted, happy guy, when I consider the trouble you have had in your life. I am not talking about the women you have worried about, but have you got any peevs at all, any quarrels with the world?

Mr. WELLMAN. I think somebody, after what I went through when he is here in the States, he shouldn't have any and anybody in the States who realizes what is is he shouldn't have any peevs at all.

Mr. O'KEEFE. He shouldn't have any peevs at all?

Mr. WELLMAN. Shouldn't have any peevs at all.

Mr. O'KEEFE. We are a very fortunate nation.

Mr. WELLMAN. Very lucky and most of them don't realize it, but I hope they will very soon.

Mr. O'KEEFE. I hope they will, too, Otto.

Let's see if you can win some money, here, chum. We are sending you a 50-carton of Franco-American products. Remember, eat hearty with Franco-American Spaghetti.

Here's what we call our grand slam question, after one day's exposure of sailor's eyes to the sun, how efficient in percentage is their vision at night, what would you say?

Mr. WELLMAN. Well, a sailor should know, I think its about 90 percent.

400 Mr. O'KEEFE. You say 90 percent?

Mr. WELLMAN. Right.

Mr. O'KEEFE. What category for you, Otto?

Mr. WELLMAN. Music.

Mr. O'KEEFE. Music. Are you up on your juke-box stuff?

Mr. WELLMAN. On the late stuff, yes, I think.

Mr. O'KEEFE. May I explain this, I always like to make a person feel at home and for heaven's sake, if you come to an answer you don't know, give it to me in one of the other four languages and I will understand.

Mr. WELLMAN. All right.

Mr. O'KEEFE. Here's the Franco-American \$2 question and Herb Organ is going to play this, he is going to ask a question on the organ.

(Music.)

Mr. WELLMAN. "Should I."

Mr. O'KEEFE. That's it.

In the \$4 question for Franco-American, he suggests the answer to "Should I."

(Music.)

Mr. WELLMAN. (Foreign tongue.)

Mr. O'KEEFE. Absolutely right.

For the benefit of people who do not understand Sanskrit, he just said, "No, no, a thousand times no."

Mr. WELLMAN. Yes.

Mr. O'KEEFE. The \$6 question for Franco-American, what is this question?

401 (Music.)

Mr. WELLMAN. "Why Can't You Behave?"

Mr. O'KEEFE. Yes, that's what we keep saying to Russia, "Why can't you behave?"

The \$10 question for Franco-American, "Why can't you behave" might get this answer—this is before his time in America, believe me.

(Music.)

Mr. WELLMAN. "That's My Weakness Now."

Mr. O'KEEFE. Hey, you're pretty hep because that song was around a long while ago. How come you know so much about songs?

Mr. WELLMAN. My father used to have a band, he was a band leader and it was most popular in Europe.

Mr. O'KEEFE. It was most popular in Europe?

Mr. WELLMAN. It was very popular.

Mr. O'KEEFE. Then I don't worry about the \$20 question. This was a great hit in America and all over the world. Franco-American says what is this question?

(Music.)

Mr. WELLMAN. "Qui."

Mr. O'KEEFE. I beg pardon?

Mr. WELLMAN. "Qui."

Mr. O'KEEFE. Oh, yes, sure.

Mr. WELLMAN. Of course, that means "Who".

Mr. O'KEEFE. It means "Who?"

Mr. WELLMAN. For the people who don't know it.

402 Mr. O'KEEFE. For the people who don't know it. You and I knew all the time. I never had my leg pulled so beautifully for the \$20 in any language.

Franco-American says:

(Music.)

Mr. WELLMAN. "It Had to be You."

Mr. O'KEEFE. You won 40 bucks. Congratulations. Thank you.

We will be back in just a moment with the grand slam winner in the Franco-American sweepstakes, but now Lou Crosby.

Mr. CROSBY. For a delicious and substantial supper that is easy on your pocketbook serve Franco-American Spaghetti, you'll like this hearty spaghetti with its luscious sauce of tangy Cheddar cheese and juicy tomatoes and it tastes so good. All eat hearty.

Just add a tossed salad, toasted rolls, apple sauce and cookies for a delightfully satisfying meal.

Yes, ma'am, when you serve Franco-American Spaghetti you sure eat hearty * * *.

Mr. O'KEEFE. The grand slam question: "After one day's exposure of sailors' eyes to the sun, how efficient in percentage is their vision at night," the answer is 50 per cent, and the Holland storekeeper, Joanne Mushinsky, with an estimate of 40 per cent, wins the money.

Mr. CROSBY. Now friends, our most exciting moment in the Franco-American sweepstakes. Today's cash prize from Franco-American amounts to \$210. Today's winning question comes from Mrs. Roy C. Hearndon of 505 Park View Avenue, Westfield, 403 New Jersey, and we'll pay half our sweepstakes, \$105 for it. The first contestant to come up with the correct answer wins the other half of our sweepstakes, or \$105.

If no one wins, the studio contestant's half of the money will be added to tomorrow's Franco-American sweepstakes.

Walter.

Mr. O'KEEFE. You have 30 seconds for Mrs. Hearndon's question. It's not too tough. The word "chortle," is defined as laughing in a chuckling, snorting fashion, by what children's author was this humorous word coined?

No, we have no winner. The sweepstakes question came from Westfield, New Jersey. The answer, Lewis Carroll.

Congratulations, Mrs. Hearndon. The check is on the way to you now. Thank you very much.

Mr. CROSBY. Every day on Double or Nothing you listeners have a chance to win half the sweepstakes money by sending in the winning sweepstakes question.

Here's all you do: Make up a question on any subject, print your name and address on the back of a Franco-American Spaghetti label, that is, a label from a can of Franco-American Spaghetti, add the call letters of the station on which you hear Double or Nothing, and write your question and answer under your name and indicate a standard authority, such as an encyclopedia, atlas or other source where we can check the accuracy of your answer.

Then mail it to Double or Nothing Sweepstakes, Box 551, Hollywood 28, California.

Questions will be judged on the basis of originality, interest and neatness and clarity of presentation.

404 Entries to be considered for next week's program must be postmarked during the seven days prior to midnight this Saturday.

The person who submits the winning entry receives one-half the sweepstakes for that program. The decision of the judges is final. Duplicate prizes will be awarded in case of ties. All questions become the property of the makers of Franco-American Spaghetti and none will be returned.

Mr. O'KEEFE. This is Walter O'Keefe saying goodbye, and when you shop, look for the name Franco-American, for you know you eat hearty with Franco-American Spaghetti.

407

In United States District Court

Civil Action No. 52-37

[Title omitted.]

Notice of motion for summary judgment

(Filed September 22, 1952)

SIRS: Please take notice that upon the amended complaint herein, the stipulation between the parties, dated September 16, 1952, the annexed affidavit of Gustav B. Margraf, sworn to September 18, 1952, and all the other papers and proceedings heretofore filed and had herein, plaintiff will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as the Court may designate for summary judgment granting the relief demanded in the amended complaint, pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts, on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

Dated: New York, New York, September 22, 1952.

Yours, etc.,

CAHILL, GORDON, ZACHRY,
& REINDEL,

Attorneys for Plaintiff.

By JOHN W. WELCH,

A member of the firm.

To: Attorney General of the United States, Washington, D. C.;
United States Attorney for the Southern District of New York,
United States Courthouse, Foley Square, New York, N. Y.;
Federal Communications Commission, Washington, D. C.

408

Affidavit

STATE OF NEW YORK,

County of New York, ss:

Gustav B. Margraf being duly sworn, deposes and says:

1. I am Vice President and General Attorney of National Broadcasting Company, Inc. (hereinafter called NBC), plaintiff herein.

2. This affidavit is made in support of NBC's motion for summary judgment to incorporate in the record before this Court on such motion the matters hereinafter set forth, all of which are stated on information and belief.

3. On December 30, 1943 Chairman Fly of the Federal Communications Commission wrote to Senator Wheeler, Chairman

of the Senate Interstate Commerce Committee, proposing legislation by Congress which would have changed the language of § 316 of the Communications Act, the statute then covering the broadcast of lottery information, to make it refer expressly to programs which offered prizes to the radio audience. Annexed hereto as Exhibit A is a copy of said letter and its enclosures, as printed, at pages 991 to 993 of a publication of the Government Printing Office entitled "Hearings before the Committee on Interstate Commerce, United States Senate, 78th Congress, 1st Session on S. 814, a bill to amend the Communications Act of 1934, and for other purposes." The suggested legislation was never adopted.

4. In 1939 the Solicitor of the Post Office Department issued two rulings with respect to whether a radio program known as "Mu\$ico" was a lottery. In the first ruling, dated July 1, 1939, the Solicitor advised the Postmaster at Monroe, Wisconsin, that Mu\$ico did not violate the Federal lottery laws. In the second ruling, dated September 29, 1939, the Solicitor advised the Postmaster of Wyoming, Illinois that Mu\$ico did violate the Federal lottery laws.

From time to time the radio program known as "Mu\$ico" has varied in format. In 1949 the attorneys for Columbia Broadcasting System Inc. inquired of the Solicitor of the Post Office Department about the format of the particular programs involved in the two conflicting 1939 rulings. The Solicitor replied in a letter dated May 3, 1949, a true copy of which is annexed hereto as Exhibit B. In the course of such letter he stated that:

"It is likely that if the 'Mu\$ico' plan were submitted to this office today, it would be held, in view of the change reflected in the enclosed notice, not to conflict with the postal lottery laws."

A true copy of the notice which the Solicitor enclosed in his letter of May 3, 1949, and which had appeared in the February 13, 1947, issue of the Postal Bulletin, is annexed hereto as Exhibit

C-1. Such notice reads in part as follows:

410 "All postmasters should carefully note the following with regard to the present policy of the Office of the Solicitor in making rulings on lotteries, gift enterprises, etc., under Section 601, P. L. & R. 1940.

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name

be registered at a store in order to be eligible for the prize, consideration is not deemed to be present."

In response to the request for information as to the format of "Mu\$ico" covered by the rulings, the Solicitor also enclosed a copy of the rules of the program, and a true copy of this enclosure is annexed hereto as Exhibit C-2. They reveal that the program was conducted as follows: Cards containing a number of squares in five horizontal rows were distributed free of charge. Each square contained the name of a song, and participants checked off the names as the songs were played in the course of the program. When a participant had completely checked a horizontal row, he became eligible for a prize. In the case of each of three rows, the first participant having completely checked the row correctly and telephoned the station broadcasting the program was awarded a cash prize. Correctly checking all the songs on one of the other two rows entitled the participant to a prize of groceries, upon presentation of the card to a store on the following day. An additional cash prize was awarded to that participant who had correctly checked any row on his card and who submitted the best advertising slogan. On information and belief, the various cards distributed differed in their format so that not all cards provided an equal chance of winning the various prizes.

411 5. On the radio program "Truth and Consequences" a prize of \$10,000 was offered for the correct identification of a well-known person, referred to as "Mr. Heartbeat," described in the following riddle which was repeated in the course of each broadcast of the program:

"Sigh Sigh Pie
Half prince and pauper I
I'm drab they say
But remember fair play
Ring Ring Hi."

Additional clues to the identity of this person were broadcast on the program each week until identification was made. Listeners were requested during the course of broadcasts to send in postcards bearing their names, addresses and telephone numbers. Listeners were also urged to contribute to the Heart Association, but such a contribution was not a condition of participation in the contest. Each week during the contest three postcards were selected at random and telephone calls were made in the course of the broadcast to the persons named on the cards. If the person called answered the telephone, he was asked to identify "Mr. Heartbeat." No clues were given to him at the time of this telephone call. A correct identification entitled him to the \$10,000 prize; a consolation prize consisting of a set of sterling silver was awarded in case of an incorrect answer.

The Solicitor of the Post Office Department on March 2, 1950, ruled that matter relating to the "Mr. Heartbeat" contest was available in so far as the Postal lottery laws are concerned.

412 A true copy of the letter to the Solicitor requesting the ruling with respect to the "Mr. Heartbeat" contest and a true copy of the Solicitor's ruling with regard thereto are hereto annexed as Exhibits D-1 and D-2 respectively.

6. When the television show "Stop the Music" was instituted, it was desired to identify members of the public who had television sets and might be expected to view such programs; accordingly, members of the public were invited to send in postcards with their names and addresses to indicate that they were interested in becoming contestants. American Broadcasting Company, Inc., made application to the Solicitor of the Post Office Department for a ruling as to whether the proposed arrangements were in violation of the postal lottery statute, United States Code, Title 18, § 1302. A ruling was made by the Solicitor. Exhibit E-1 hereto annexed is a true copy of the letter requesting such ruling and Exhibit E-2 hereto annexed is a true copy of the Solicitor's reply containing such ruling.

7. The Federal Communications Commission in 1940 referred to the Department of Justice of the United States for possible prosecution under § 316 of the Communications Act, certain programs broadcast on various stations. The first such referral was by a letter from Chairman Fly of the Commission to the Attorney General dated February 19, 1940, transmitting documents relating to certain programs broadcast by Stations KWFT and KBST for Mead's Bakery and to a program known as "The Pot of Gold" broadcast over the Red network of NBC. Annexed hereto as Exhibit F-1 is a true copy of the letter of Chairman Fly dated February 19, 1940, and annexed hereto as Exhibits F-2, F-3 and

413 F-4, respectively, are true copies of the documents enclosed with such letter, consisting of an affidavit of Joe B. Carrigan sworn to January 1, 1940, with certain documents attached; a letter from Joe A. Faucett to an inspector of the Federal Communications Commission dated December 11, 1939; and a transcript of one broadcast of the "Pot of Gold" program over Station WRC. Annexed hereto as Exhibit F-5 is a true copy of a press release of the Federal Communications Commission dated February 8, 1940, relating to this referral. Annexed hereto as Exhibit F-6 is a true copy of a letter from the Department of Justice to Chairman Fly dated April 10, 1940, declining to institute prosecution under § 316 of the Communications Act with respect to the "Pot of Gold" and "Mead's Bakery" programs.

On March 29, 1940, Chairman Fly transmitted to the Attorney General information concerning five additional programs for pos-

sible prosecution. On April 29, 1940, the Department of Justice replied to the Commission with respect to each of such programs that it had concluded that no action was warranted by the Department of Justice.

Annexed hereto as Exhibits G-1 and G-2, respectively, are true copies of Chairman Fly's letter of March 29, 1940, with enclosures, relating to "Dixie Treasure Chest," and of the Department of Justice's reply dated April 29, 1940. Annexed hereto as Exhibits H-1 and H-2, respectively, are true copies of Chairman Fly's letter of March 29, 1940, with enclosures, relating to the program called "Sears' Grab Bag," and the Department of Justice's reply of April 29, 1940. Annexed hereto as Exhibits I-1 and I-2,

1940, with enclosures, relating to the program entitled 414 "Especially For You," and of the Department of Justice's reply dated April 29, 1940. Annexed hereto as Exhibits J-1 and J-2, respectively, are true copies of Chairman Fly's letter of March 29, 1940 relating to the program entitled "Mu\$ico," and of the Department of Justice's reply of April 29, 1940. Annexed hereto as Exhibits K-1 and K-2, respectively, are true copies of Chairman Fly's letter of March 29, 1940, concerning the program entitled "Songo," and of the Department of Justice's reply of April 29, 1940. The enclosures originally sent with the letters annexed hereto as Exhibits J-1 and K-1 are not available. A transcript of the broadcast of the program "Mu\$ico" on February 16, 1940, over radio station WGN is annexed hereto as Exhibit L. On information and belief the original enclosures sent with the letter, annexed hereto as Exhibit J-1 included a copy of either this transcript or of the transcript of another broadcast substantially identical in format. The program "Songo" to which Exhibits K-1 and K-2 relate is believed to have had a format substantially similar to that of "Mu\$ico" as revealed by Exhibit L, except that "Songo" used cards furnished by the Nevins Drug Co., Philadelphia.

8. Since the rulings and statements of the Post Office Department and of the Department of Justice set out above, there have been no contrary rulings or statements by such authorities and there have been no court decisions contrary thereto.

GUSTAV B. MARGRAF.

Sworn to before me this 18th day of September 1952.

[SEAL]

DORIS M. CROOKER,

Notary Public.

Notary Public for the State of New York, No. 60-0807300.

Qualified in Westchester County. Cert. filed in New York County Clerk. Cert. filed with City Register N. Y. County.

Commission expires March 30, 1953.

415 [Exhibit A omitted. Printed side page 44 ante.]

419

Exhibit B to affidavit

[COPY]

POST OFFICE DEPARTMENT,
OFFICE OF THE SOLICITOR,
Washington 25, D. C., May 3, 1949.

MR. SAMUEL I. ROSENMAN,
ROSENMAN, GOLDMARK, COLIN & KAYE,
*Attorneys at Law, 165 Broadway,
New York 6, New York.*

DEAR MR. ROSENMAN: This will acknowledge your letter of April 22, 1949, with further reference to past rulings of this office concerning the plan "Musico." You state that your firm represents clients who are interested in exploiting a radio game which is somewhat similar to, although not identical with, "Musico." You request copies of the letters from the postmasters submitting the plan "Musico" to this office which resulted in conflicting opinions being furnished, so that the "factual differences" in the schemes might be determined by you.

I enclose as information copy of a notice which appeared in the Postal Bulletin of February 13, 1947, describing a change in the view of this office as to the element of consideration in prize schemes. It is likely that if the "Musico" plan were submitted to this office today, it would be held, in view of the change reflected in the enclosed notice, not to conflict with the postal lottery laws. I also enclose for your information a copy of the rules for "Musico".

Very truly yours,

[s] Frank J. Delany,
FRANK J. DELANY,
Solicitor.

420

Exhibit C-1 to affidavit

[COPY]

POST OFFICE DEPARTMENT,
OFFICE OF THE SOLICITOR,
Washington 25, D. C.

The following notice appeared in the February 13, 1947, issue of the Postal Bulletin:

INSTRUCTIONS OF THE SOLICITOR

RULINGS ON LOTTERIES, GIFT ENTERPRISES, ETC.

All postmasters should carefully note the following with regard to the present policy of the Office of the Solicitor in making rul-

ings on lotteries, gift enterprises, etc., under section 601, P. L. & R., 1940.

In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes awarded by means of lot or chance) that the "consideration" involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.

If postmasters are in doubt as to whether or not matter relating to a particular plan should be treated as nonmailable, they should submit same to this office for a ruling as provided in section 602, P. L. & R., 1940.

SOL-44.

(10-5-48).

421

Exhibit C-2 to affidavit

[COPY]

"HOW TO WIN MU\$ICO PRIZES

"Follow these easy rules:

"1. Listen every Friday night at 8:30 to 9:00 P. M. to station WMBD (1440 on your dial), Peoria, Illinois.

"2. As each song is played identify it and check title on this MU\$ICO score card. Listen carefully to the radio program and follow instructions as given by the announcer.

"3. The first three rows are chosen for cash prizes. The person who checks off all the songs across ROW ONE correctly and telephones Station WMBD first wins \$5. The first person who checks off all the songs across ROW TWO correctly and is the first to telephone Station WMBD wins \$10. The first person who checks off all the songs in ROW THREE correctly and is the first to telephone Station WMBD wins \$15. Station WMBD's telephone number is 7133.

"4. If you check off all the songs on either ROW FOUR or ROW FIVE you win a large bag of Kroger foods. Take card to your Kroger Store Manager who will check if correct and award prize. Do not telephone Radio Station. Winning food prize cards must be given to Kroger Store Manager on next day—Saturday following this week's broadcast.

"5. Employees of Kroger Grocery & Baking Co. or their families are not eligible for prizes.

"6. If you fill in any row across correctly you may win grand prize of \$20 by simply writing best slogan—I like Kroger Hot-Dated Coffee because

(Ten words or less)

"Name:

"Address:

"Cards must be given to Kroger Store Manager on next day—Saturday following broadcast. Duplicate prizes awarded in case of ties. Decision of judges is final.

"* * * No purchase is required in order to obtain a MU\$ICO card."

422 [Exhibits D-1 and D-2 omitted. Printed side page 39 ante.]

427 [Exhibits F-1 through F-4 omitted. Printed side page 48 ante.]

444 *Exhibit F-5 to affidavit*

[Press release February 8, 1940]

Federal Communications Commission

WASHINGTON, D. C. (38999)

PRIZE RADIO PROGRAMS CITED

The Federal Communications Commission has transmitted to the Department of Justice the facts concerning the Tums "Pot o' Gold" program, broadcast over the National Broadcasting Company network, and a program advertising Mead's Bakery, recently broadcast by stations KWFT and KBST at Wichita Falls and Big Springs, Texas, respectively.

The Commission has received complaints that these programs, which involve gifts of money by chance, violate Section 316 of the Communications Act which prohibits the broadcasting of "* * * any advertisement, or information concerning any lottery, gift enterprise, or similar scheme * * *."

In turning these cases over to the Department of Justice for such action as that department deems necessary and warranted, the Commission offers any cooperative assistance desired.

445 [Exhibits F-6 through K-2 omitted. Printed side page 62 ante.]

470 [Exhibit L omitted. Printed side page 86 ante.]

[Title omitted.]

[File endorsement omitted.]

Notice of motion to strike, etc.

(Filed September 23, 1952)

SIRS: Please take notice that upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 1st day of August, 1952, and upon all the other papers and proceedings heretofore filed and had herein, the undersigned will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as the Court may designate for an order striking from the amended complaint paragraphs 13, 14 and 16, and for an order dismissing the complaint or, in the alternative, directing that summary judgment be entered in favor of the United States of America and the Federal Communications Commission, defendants, on the grounds stated in the attached motions.

Dated Washington, D. C., September 22, 1952.

William J. Hickey,

WILLIAM J. HICKEY,

*Special Assistant to the Attorney General,
Attorney for the United States of America.*

Benedict P. Cottone,

BENEDICT P. COTTONE,

General Counsel,

Richard A. Solomon,

RICHARD A. SOLOMON,

Assistant General Counsel,

NEWELL A. CLAPP,

Acting Assistant Attorney General,

JAMES E. KILDAY,

Special Assistant to the Attorney General,

MYLES J. LANE,

*United States Attorney for the Southern District of New
York,*

Attorneys for the United States of America.

Daniel R. Ohlbaum,

DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

[Proof of service omitted in printing.]

495

In United States District Court

[Title omitted.]

[Filed endorsement omitted.]

Motion to strike and motions to dismiss the complaint or, in the alternative, for summary judgment

(Filed September 23, 1952)

Upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 1st day of August 1952, and upon all other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court, pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure, that paragraphs 13, 14, and 16 of the amended complaint be stricken from the complaint, and further move that the amended complaint be dismissed or, in the alternative, for summary judgment in their favor.

A. The ground of the Motion to Strike is:

The programs described in paragraphs 13, 14, and 16 of the amended complaint are not within paragraph (b) of the rules in issue and these paragraphs are therefore immaterial and impertinent.

B. The ground of the Motion to Dismiss the complaint is:

Plaintiff fails to state a claim upon which relief can be granted.

C. The ground of the Motion for Summary Judgment is:

The amended complaint together with the exhibits thereto annexed, the affidavit submitted on this motion, and the other papers and proceedings heretofore filed and had herein, show that there is no genuine issue as to any material fact and that defendants

United States of America and the Federal Communications Commission are entitled to a judgment as a matter of law.

496 Dated Washington, D. C., September 22, 1952.

William J. Hickey,

WILLIAM J. HICKEY,

Special Assistant to the Attorney General,

Attorney for the United States of America.

Benedict P. Cottone,

BENEDICT P. COTTONE,

General Counsel,

Richard A. Solomon,

RICHARD A. SOLOMON,

Assistant General Counsel,

Daniel R. Ohlbaum

DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

NEWELL A. CLAPP,

Acting Assistant Attorney General,

JAMES E. KILDAY,

Special Assistant to the Attorney General,

MYLES J. LANE,

United States Attorney for the

Southern District of New York,

Attorneys for the United States of America.

497

Affidavit of Benedict P. Cottone

DISTRICT OF COLUMBIA,

City of Washington, ss:

Benedict P. Cottone, being duly sworn, deposes and says:

1. He is the General Counsel of the Federal Communications Commission, and makes this affidavit in support of the Motion for Summary Judgment made by the United States of America and the Federal Communications Commission, defendants, and in opposition to the Motion for Summary Judgment made by the plaintiff.

2. He is familiar with the Commission's proceedings with respect to the promulgation of rules governing the broadcast of lottery information and that the proceedings included the following:

(a) These proceedings concerning the promulgation of rules governing the broadcast of lottery information were instituted by the Commission's Notice of Proposed Rule Making, released August 5, 1948. Proposed rules interpreting Section 316 of the Communications Act of 1934, as amended, 47 U. S. C. Section 326,

were appended to that Notice. The section referred to prohibited the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance."

(b) In the light of the prior removal of Section 316 from the Communications Act of 1934, as amended, and recodification of this section as Section 1304 of the United States Criminal Code, 18 U. S. C. Section 1304, the Commission issued, on August 27, 1948, a Supplemental Notice of Proposed Rule Making.

498 (c) Pursuant to the above Notices, briefs and comments were filed with the Commission by the Radio Council of National Advertisers, Inc.; Premium Advertising Associates of America, Inc.; Radio Features, Inc.; Louis G. Cowan, Inc.; Maryland Broadcasting Company, Licensee of Station WITH; Columbia Broadcasting System, Inc.; American Broadcasting Company, Inc.; National Association of Broadcasters; Pierson and Ball; Arthur W. Scharfeld; and National Broadcasting Company, Inc., plaintiff in this action.

(d) On October 19, 1948, oral argument was held before the Commission en banc, in which National Association of Broadcasters; Maryland Broadcasting Company; Radio Features, Inc.; Radio Council of National Advertisers; Columbia Broadcasting System, Inc.; American Broadcasting Company, Inc.; W. Theodore Pierson; Arthur W. Scharfeld; Simons Broadcasting Company; Louis G. Cowan, Inc.; and National Broadcasting Company, Inc., plaintiff in this action, participated.

(e) After consideration of the briefs and comments filed, and of the oral arguments the Commission released, on August 19, 1949, its Report and Order promulgating Sections 3.192, 3.292, and 3.692 of its Rules and Regulations, to enjoin the enforcement of which this action is brought. The Report and Order specified that these rules were to become effective on October 1, 1949. Commissioners Coy, Chairman, Hyde, and Jones did not participate in the adoption of the Report and Order of August 19, 1949, and Commissioner Hennock dissented from its adoption. By its Sixth Report and Order adopted on April 11, 1952 in Dockets No. 8736, et al., the Commission renumbered Section 3.692 as Section 3.656.

(f) The rules appended to the Report and Order of August 19, 1949 provide that no authorization for the operation of a broadcast station will be granted if the applicant proposes to follow or continue to follow a policy of broadcasting or permitting the broadcasting of any program violative of Section 1304 of

499 the United States Criminal Code. The rules further set forth with specificity certain types of programs which the Commission will in any event consider as falling within the provisions of that statute.

(g) This action and a similar action brought in the District Court for the Northern District of Illinois having been commenced, a temporary restraining order suspending the effectiveness of the rules here in issue with respect to the parties in litigation having been issued by the District Court for the Northern District of Illinois on September 13, 1949, and this Court having decided on September 19, 1949 to issue a similar order, the Commission, on September 21, 1949 issued an order postponing the effective date of said rules until at least thirty days after the ultimate determination of these actions.

3. A certified copy of the proceedings before the Commission in Docket 9113 (In re Promulgating of Rules Governing Broadcasting of Lottery Information) is filed herewith and incorporated herein by reference as Exhibit A.

4. Plaintiff broadcasts one or more programs which contain features comprehended by one or more of the rules in issue in this case. After such rules become effective, the failure of plaintiff to discontinue the broadcasting of any or all of such programs would result in setting for hearing applications for renewal of licenses filed by plaintiff and, upon a finding that such programs have been or will continue to be carried, such applications would be denied in accordance with the policy set out in the rules in issue.

5. Attached hereto as Exhibits B and C are true photostatic copies of letters to the Commission dated, respectively, April 4, 1940 and April 11, 1940, and enclosures, received from radio station WGN, Inc. with respect to changes in the format of the radio program called "Musico" which were made prior to April 29, 1940.

6. Affiant submits, in response to the contentions of the plaintiff, that:

500 (a) The Order and the Rules in issue are a proper application of the public policy announced by the Congress of the United States which the Commission must consider in fulfilling its duties under the Communications Act of 1934, as amended, and since denial of a license on the ground that the public interest would not be served by a grant is authorized by Sections 307, 308, 309, and 312 of the Communications Act, the promulgation and enforcement of the Order and Rules in issue are not in contravention of Section 9 (a) of the Administrative Procedure Act;

(b) The Commission in determining the qualifications of an applicant to hold a broadcast authorization may consider the doing of acts which constitute a violation of a criminal statute of the United States which expresses public policy in the broadcasting field as a ground for determining whether the public interest would be served by the grant of a license;

(c) The Order and the Rules in issue are a proper and reasonable exercise of the Commission's functions under the Communications Act of 1934, as amended;

(d) The Order and the Rules are, as a matter of law, a correct interpretation of Section 1304 of the United States Criminal Code;

(e) The Order and the Rules do not violate Section 326 of the Communications Act of 1934, as amended;

(f) The Order and the Rules were issued in accordance with the Commission's Notice of August 27, 1948, after consideration of filed comments and briefs and an oral argument in which all interested parties participated, and were duly published in the Federal Register (14 F. R. 5429, September 1, 1949); accordingly the Order and the Rules in issue were promulgated in accordance with the provisions of Section 4 (a) and (b) of the Administrative Procedure Act;

(g) The Order and the Rules are not inconsistent with the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act; and

501 (h) The Order and the Rules do not violate any of the provisions of the Constitution of the United States or of the Amendments thereto.

7. Affiant submits that Exhibits A, B, and C are relevant to the above issues sought to be raised and that they show that the Order in issue is within the Commission's authority conferred by the Communications Act of 1934, as amended; that it is in accordance with the Commission's Notice of August 27, 1948, pursuant to which an oral argument on which the Order is based was held; that it is proper and reasonable and in the public interest, convenience and necessity; that it is not violative of any of the provisions of the Constitution of the United States; and that there is no genuine issue as to any material fact.

Benedict P. Cottone.

BENEDICT P. COTTONE.

Subscribed and sworn to before me this 1st day of August 1952.

[SEAL]

HELEN A. MARSTON.

Notary Public.

My commission expires April 14, 1957.

238 FCC VS. AMERICAN BROADCASTING CO., INC., ET AL.

502 In United States District Court, Southern District
of New York

Civil Action No. 52-37

NATIONAL BROADCASTING COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

[File endorsement omitted.]

Final judgment

(Filed March 11, 1953)

This cause having come on to be heard on plaintiff's motion for summary judgment and on defendants' motion for an order dismissing the amended complaint or, in the alternative, for summary judgment, and on defendants' motion for an order striking paragraphs 13, 14, and 16 of the amended complaint, and the parties having stipulated the facts for the purposes of this action, and the Court having heard the arguments of counsel, and upon consideration thereof and of the briefs and documents filed by the parties, and the majority of the Court having rendered and filed an opinion on February 5, 1953 stating that it was unnecessary to make findings of fact in view of the facts having been stipulated by the parties and setting forth its conclusions of law and the relief to be granted, and a dissenting opinion having been filed on said date, it is hereby -

Ordered, adjudged and decreed that plaintiff's motion for summary judgment is granted to the extent that defendants are permanently restrained and enjoined from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of defendant Federal Communications Commission's Rules

503 adopted August 18, 1949 and that the Order of said defendant Federal Communications Commission dated

August 18, 1949 adopting said subdivisions (2), (3) and (4) of paragraph (b) of said Sections 3.192, 3.292 and 3.656 of said Rules is to that extent vacated and set aside; and it is hereby further

Ordered, adjudged and decreed that plaintiff's motion for a summary judgment and an injunction is denied with respect to paragraphs (a) and (b) (1) of said Sections 3.192, 3.292 and 3.656 of said Rules, and that the said Order of said defendant Federal Communications Commission adopting said Rules is sustained with respect to said paragraphs (a) and (b) (1); and it is hereby further

Ordered, adjudged and decreed that defendants' motion to strike paragraphs 13, 14 and 16 of the amended complaint is granted; and it is hereby further

Ordered, adjudged and decreed that defendants' motion to dismiss the amended complaint is denied; and it is hereby further

Ordered, adjudged and decreed that defendants' motion for summary judgment is granted only with respect to paragraphs (a) and (b) (1) of Sections 3.192, 3.292 and 3.656 of said Rules and is in all other respects denied.

Dated: New York, N. Y. March 10th, 1953.

VINCENT L. LIEBELL,
District Judge.

EDWARD WEINFELD,
District Judge.

Dissenting:

CHARLES E. CLARK,
Circuit Judge.

Judgment entered March 11, 1953.

WILLIAM V. COUVELL,
Clerk.

504 The foregoing judgment is hereby consented to as to form and plaintiff may submit same for signature and entry without further notice to defendants.

MYLES J. LANE.

United States Attorney for the Southern District of New York,
Attorney for the defendant, United States of America.

BENEDICT P. COTONE,
Attorney for Defendant,
Federal Communications Commission.

508 In United States District Court
Civil Action No. 52-37

[Title omitted.]

Order allowing appeal
(Filed May 8, 1953)

The Federal Communications Commission, defendant herein, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the order of this Court in this cause entered on March 11, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commis-

sion from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered that said appeal be and the same hereby is allowed as prayed for and that the record
509 on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court.

It is further ordered that citation shall issue in accordance with law.

CHARLES E. CLARK,
*Judge of the United States Court of
Appeals for the Second Circuit.*

VINCENT L. LEIBELL,
Judge of the United States District Court.

EDWARD WEINFELD,
Judge of the United States District Court.

Dated May 8th, 1953.

512 In United States District Court

[Title omitted.]

Assignment of errors and prayer for reversal

(Filed May 8, 1953)

The Federal Communications Commission, defendant in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, does hereby file the following assignment of errors upon which it will rely in its prosecution of said appeal from the order of the statutory three-judge United States District Court for the Southern District of New York, entered on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949.

Said Court erred:

1. In holding that subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Rules and Regulations of the Federal Communications Commission adopted in its Report and Order of August 18, 1949 go beyond, and constitute an incorrect interpretation of, Section 1304, Title 18, United States Code and are an unlawful exercise of the rule making power.

513 2. In granting plaintiff's motion for summary judgment in part by permanently enjoining the Federal Communications Commission from enforcing said subdivisions (2), (3), and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations and, to that extent, vacating and setting aside the Commission's order adopting said Rules.

3. In denying defendants' motion to dismiss the amended complaint or, in the alternative, for summary judgment in favor of defendants, to the extent that the Court did so in denying the motion to dismiss the amended complaint and in granting defendants' motion for summary judgment in defendants' favor only in respect to paragraphs (a) and (b) (1) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations.

Wherefore, defendant Federal Communications Commission prays that the order entered herein on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendants' favor and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949, be reversed, and that such other and further relief be granted as to the Court may seem just and proper.

Dated May 8, 1953.

Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,

J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,
Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

516 In United States District Court
Civil Action No. 52-37

[Title omitted.]

[File endorsement omitted.]

Order permitting transmission of original documents

(Filed May 25, 1953)

In accordance with the provisions of the praecipe herein, and pursuant to the motion to transmit certain original documents on the appeal of the above-entitled cause to the Supreme Court of the United States, and upon the annexed consent by the attorneys for the plaintiff, it is

Ordered, that the original of all documents, transcripts, exhibits or other parts of this Court's records in the above-entitled cause, of which there are no copies on file, may all be forwarded in lieu of copies of such documents to the Clerk of the Supreme Court of the United States as part of the transcript of the record on the appeal herein.

CHARLES E. CLARK,
*Judge of the United States Court of Appeals for the
Second Circuit.*

VINCENT L. LEIBELL,
Judge of the United States District Court.

EDWARD WEINFELD,
Judge of the United States District Court.

Dated May 21st, 1953.

523 In the United States District Court

Civil Action No. 52-37

[Title omitted.]

[File endorsement omitted.]

Praecipe

(Filed May 8, 1953)

*To the Clerk of the United States District Court
for the Southern District of New York:*

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court, and include in said transcript the following:

1. Complaint of National Broadcasting Company, Inc., filed September 2, 1949, and exhibits thereto.

2. Order to show cause signed by Judge Simon H. Rifkind dated September 15, 1949, together with affidavit of Niles Trammel, sworn to September 15, 1949 and appendices thereto.

3. Order convening three-judge court, entered September 20, 1949.

4. Temporary restraining order signed by Judge Simon H. Rifkind, dated September 23, 1949.

5. Notice of Clerk of the Court that motion for interlocutory injunction was to be heard on October 27, 1949, dated October 17, 1949.

6. Stipulation for postponement of hearing on motion for interlocutory injunction, dated October 17, 1949.

7. Answer of the United States of America and the Federal Communications Commission, together with affidavit of service.

8. Stipulation for filing of amended complaint dated September 16, 1952, and amended complaint of National Broadcasting Company, Inc., together with exhibits thereto, filed September 22, 1952.

524 9. Notice of motion for summary judgment on behalf of National Broadcasting Company, Inc., together with affidavit of Gustav B. Margraf, sworn to September 18, 1952, and exhibits thereto, filed September 22, 1952.

10. Notice of motion and motion to strike paragraphs 13, 14, and 16 of amended complaint, and to dismiss complaint, or for summary judgment on behalf of United States of America and the Federal Communications Commission, together with affidavit of Benedict P. Cottone, sworn to August 1, 1952, and exhibits thereto, filed September 22, 1952.

11. Order convening three-judge court, entered October 30, 1952.

12. Briefs filed on behalf of National Broadcasting Company, Inc., and on behalf of United States of America and the Federal Communications Commission.

13. Opinions of the district court, dated February 5, 1953.

14. Final judgment of the district court, entered March 11, 1953.

15. Petition for appeal.

16. Assignment of errors and prayer for reversal.

17. Statement as to jurisdiction.

18. Order allowing appeal.

19. Statement required by Paragraph 2, Rule 12, of the Rules of the Supreme Court of the United States.

20. Order permitting transmission of original documents.

21. Citation on appeal.

22. Admission of service of papers on appeal.

23. The praecipe with acknowledgment of service and waiver.

24. Clerk's certificate.

Said transcript is to be prepared as required by law and the Rules of this Court and Rules of the Supreme Court of the United States, and is to be filed in the Office of the Clerk of the Supreme Court.

Dated May 8, 1953.

Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,
J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,
Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,

Attorneys for the Federal Communications Commission.

528

In United States District Court

COLUMBIA BROADCASTING SYSTEM, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

Civil Action No. 52-38

Stipulation for filing amended complaint—filed September 23, 1952

[File endorsement omitted.]

It is hereby stipulated and agreed by and between the parties hereto that:

1. Plaintiff may serve and file an amended complaint herein in the form of that annexed hereto as Exhibit 1.

2. For the purposes of any motions which plaintiff or defendants or both may bring for summary judgment (a) all the allegations of fact set forth in said amended complaint shall be taken as admitted by the defendants, and (b) facts set forth in the amended complaints in the companion actions of National Broadcasting Company v. FCC, Civil Action No. 52-37, and American Broadcasting Company v. FCC, Civil Action No. 52-24, and in the affidavits, or any of them, filed in either of said companion actions by either plaintiffs or defendants therein, and deemed admitted in those actions shall be deemed admitted and part of the record in this action.

3. No objection will be raised by defendants to the amended complaint or to the affidavit of Max Freund annexed to plaintiff's notice of motion for summary judgment.

529

ment herein on the ground that the sources of information or the grounds for belief as to the matters set forth upon information and belief are not revealed therein.

Dated: New York, N. Y., September 22, 1952.

ROSENMAN, GOLDMARK, COLIN & KAYE,
Attorneys for Plaintiff.

WILLIAM J. HICKEY,
Attorney for Defendant, United States of America,
MYLES J. LANE,
United States Attorney for the Southern District
of New York,

DANIEL R. OHLBAUM,
Attorney for Defendant,
Federal Communications Commission.

So ordered: September 23, 1952.

EDWARD A. CONGER,
U. S. D. J.

530

In United States District Court

Civil Action No. 52-38

[Title omitted.]

Amended complaint

(Filed September 23, 1952)

Plaintiff, by its attorneys, Rosenman, Goldmark, Colin & Kaye, for its amended complaint herein, alleges:

First: This is an action to set aside, annul and permanently enjoin the enforcement of an Order of the Federal Communications Commission (hereinafter referred to as "the Commission") issued on August 18, 1949, and the Rules thereby adopted and designated as Sections 3.192, 3.292 and 3.692. This action is brought pursuant to the provisions of Section 402 (a) of the Communications Act of 1934, as amended (ch. 652, 48 Stat. 1093; 47 U. S. C. Sec. 402 (a), as amended by ch. 139, Pub. Law 72, Sec. 132, approved May 24, 1949), of Sections 1336, 1398, 2284, 2321-2325, inclusive, of Title 28 United States Code, and of Section 10 of the Administrative Procedure Act (ch. 324, Sec. 10, 60 Stat. 243; 5 U. S. C. Sec. 1009).

Second: Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its residence and principal office in the City, County and State of New York, and within the Southern District of New York.

531 Third: The Commission, created by the Communications Act of 1934, is charged with executing and enforcing the provisions of that law, as amended.

Fourth: Plaintiff is and for years has been engaged principally in the business of operating a nationwide radio network and a television network. Plaintiff also is the owner, operator and licensee of five amplitude modulation or standard broadcast radio stations, four frequency modulation (FM) broadcast radio stations and one television (TV) station. Plaintiff also holds a construction permit for a second television station, which is being operated under special temporary authorization. A wholly owned subsidiary of plaintiff is the owner, operator and licensee of one standard broadcast radio station and is the holder of a construction permit for one FM station, which FM station is being operated under special temporary authorization.

Fifth: Plaintiff's network business consists of the furnishing of programs to radio and television stations for simultaneous, delayed or other broadcast by such stations. Plaintiff furnishes radio network programs to more than 200 standard broadcasting stations and its television network programs to more than 60 television (TV) stations, pursuant to contracts. Said stations are known as network affiliates. In addition, plaintiff also broadcasts said programs over its own and its subsidiary's stations, which are part of said networks.

Sixth: Programs broadcast by radio or television stations are of two types: commercial and sustaining. Commercial programs are those sponsored by an advertiser which pays for the broadcast thereof. Sustaining programs are not sponsored or paid for by any advertiser.

532 Seventh: Plaintiff, in its network operations, furnishes sustaining programs to its network stations. It does so without charge except in the case of certain types of television sustaining programs. It also furnishes said stations with all commercial programs which a sponsor wishes them to broadcast and which the stations accept for broadcast. The sponsor pays plaintiff and plaintiff in turn pays the stations as provided in its affiliation contracts.

Eighth: Among other programs, plaintiff invested large sums of money in the network programs known as "Sing It Again" and "Hit the Jackpot" which involve the award of prizes.

Ninth: (a) Between May 1948 and October 1949, "Sing It Again" was broadcast by radio only on a sustaining basis. In October 1949, one-quarter of the hourly radio broadcast was sponsored and thereafter one or more of the quarterly hour periods of the program were broadcast commercially. In October 1950, "Sing It Again" was also presented over television on a sponsored basis. "Sing It Again" was thus a one hour program, broadcast weekly simultaneously over radio and television stations. "Sing It Again" was discontinued on radio and television on June 23, 1951.

Plaintiff received each week from sponsors in excess of \$16,000 for the program itself plus in excess of \$15,000 for the broadcast and telecast of said program. Plaintiff's weekly profit was very substantial.

(b) "Hit the Jackpot," which was a weekly program on radio only, was first broadcast on May 9, 1948 on a sustaining basis. It was broadcast commercially from June 29, 1948 to December 27, 1949, and from May 28, 1950, to July 30, 1950. Said program was discontinued on October 1950. Plaintiff received each week from the sponsor in excess of \$2,000 for the program itself and \$1,900 for the broadcast thereof. Plaintiff's weekly profit was very substantial.

533 Tenth: (a) The facts as to "Sing It Again," were as follows:

Performers sang a popular song and then repeated it but this time with parody lyrics describing some person, place, event, or the like. Contestants, selected at random from phone books, were called on the telephone during the program. The contestants paid nothing in order to compete. They were asked to identify the person, place or event described by the parody lyrics which they heard over the radio. If the contestant answered correctly, he won a prize and then had a chance to identify a secret voice. The secret voice sang giving clues as to his or her identity. Additional clues were also given on the program and on other programs. The person identifying the secret voice won a main prize. The main prize was increased week by week until the proper identification was made.

If the contestant failed to identify the person referred to in the parody lyrics he was given a prize of lesser value (hereinafter referred to as a "consolation prize"), and then another contestant in the studio, chosen by lot by the number on the stub of his admission ticket, was given the opportunity to answer and win a prize. He was awarded no prize if he answered incorrectly. The contestant in the studio had no opportunity to try for the mystery voice main prizes. The studio contestants were admitted to the studio without charge and paid nothing in order to compete.

(b) The facts as to "Hit The Jackpot" were as follows:

Studio contestants were selected by prebroadcast interviews. Two contestants—one called "Climber" and the other "Challenger"—played at one time. Climber was asked a question. After he answered, Challenger was asked whether he accepted the answer as correct or whether he challenged it. If Climber
534 answered the question correctly and Challenger accepted the answer, Climber moved up one of four steps leading to the opportunity to win a large prize and Challenger stayed in the game. If Climber's answer was correct but Challenger challenged

it, Climber moved up one step and Challenger dropped out, to be replaced by a new Challenger. If Climber answered incorrectly and Challenger challenged the answer, Climber dropped out of the game and Challenger took his place at whatever step the Climber was at. If Climber answered wrongly and Challenger accepted his answer as correct, Climber advanced one step and Challenger dropped out. After advancing three steps, the contestant was required to answer a fourth question correctly. If he succeeded in so doing, he obtained the right to try to win the main prize. He won the main prize if he identified a so-called secret saying which was acted or sounded out through recordings. Each contestant winning a step also was awarded a prize.

Each time a studio contestant tried to identify the secret saying and failed, a nonstudio contestant (selected by chance from postcards sent in) was called at his home and given an opportunity to identify the secret saying as he listened to it over the radio or telephone, depending on the time zone in which he was located. If he failed, then a second non-studio contestant was called at his home and similarly asked to identify the secret saying. If the two nonstudio contestants failed, then the contest was resumed with studio contestants participating again.

The secret saying was kept on the program with new clues added from week to week until it was correctly identified by a contestant. The main prize was increased each week until a contestant won.

The contestants—studio and nonstudio—paid nothing in order to compete.

535 (c) Annexed to this amended complaint as Exhibit I is a typewritten transcription of "Sing It Again" as broadcast on August 27, 1949. Annexed hereto as Exhibit II is a typewritten transcription of "Hit the Jackpot" as broadcast on August 23, 1949.

Insofar as the Order and Rules referred to in Paragraph Fourteenth of this Amended Complaint are concerned said transcriptions are typical of all broadcasts of said programs.

(d) This Paragraph Tenth sets forth everything which transpired between plaintiff and sponsors on the one hand and contestants and listening and viewing audiences on the other hand with respect to said programs "Sing It Again" and "Hit The Jackpot".

Eleventh: (a) Plaintiff's investment in said programs "Sing It Again" and "Hit The Jackpot" amounted to hundreds of thousands of dollars.

Said programs, and each of them, constituted valuable property worth hundreds of thousands of dollars.

Said programs, and each of them, were popular with the public and had great good will. The radio audience for each of the said programs listed above was in the millions and the television audience for "Sing It Again" in the tens of thousands.

Said programs and, in general, programs of their type, have wide audience appeal and are of great value to plaintiff.

Sponsors have discontinued said programs for the reason, among others, upon information and belief, that the Commission's Rules (referred to in Paragraph Fourteenth of this amended complaint) have declared said programs to be illegal as violative of Section 1304 of the United States Criminal Code

(18 U. S. C. § 1304). In addition, plaintiff, upon information and belief, for the same reason has been unable to attract new sponsors for other like programs which come within the proscription of the Rules.

(b) The success of a network in attracting sponsors depends, in part, upon the number of people who listen to or view its programs.

Twelfth: Neither "Sing It Again" nor "Hit The Jackpot" has ever been adjudicated by any court to be in violation of Section 1304 of the United States Criminal Code, or of any criminal statute and no criminal proceeding has ever been instituted against plaintiff or any person, firm or corporation on the ground that said programs or any of them violate a criminal statute, federal or state. On information and belief: No program similar to said programs has ever been adjudicated by any court to be in violation of Section 1304 of the United States Criminal Code, or any criminal statute, and no criminal proceeding has ever been instituted against any person, firm or corporation on the ground that any program similar to said programs violates a criminal statute, state or federal.

Thirteenth: There has been no finding of fact by the Commission that said program "Sing It Again" and "Hit The Jackpot" and programs similar thereto have had a demoralizing or other deleterious, harmful or evil effect on the public.

Fourteenth: The Commission on August 5, 1948 issued a notice (13 Fed. Reg. 4748) entitled "In the Matter of Promulgation of Rules Governing Programs Prohibited by Section 316 of the Communications Act—," a copy of which is annexed hereto as Exhibit III, and on August 27, 1948 it issued a Supplemental Notice of Proposed Rule Making (13 Fed. Reg. 5075), a copy of which is annexed hereto as Exhibit IV.

537 Pursuant to said notices the Commission, sitting en banc, heard oral argument on October 19, 1948. Plaintiff, with the permission of the Commission, having theretofore filed a

brief, appeared and made an oral argument in opposition. No evidence was ordered to be taken by the Commission nor was any evidence heard by the Commission.

The Commission issued its Report and Order with Rules attached thereto on August 18, 1949, a copy of each of which is hereto annexed in Exhibit V. In adopting said Report and Order with Rules attached, the Commission acted by four of its members, one of whom dissented.

Fifteenth: By the terms of said Order, the Rules were adopted effective October 1, 1949. Said Rules attached to said Report and Order provide:

"**LOTTERIES AND GIVE-AWAY PROGRAMS.**—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See 18 U. S. C. Sec. 1304.)

"(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or in aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

Sixteenth: All stations operate solely by virtue of licenses issued by the Commission. Licenses are granted by the Commission for a term of three years for standard and frequency modulation stations and one year for television stations.

The licenses of plaintiff's five standard stations will expire as follows:

WCBS (New York)-----	November 1, 1952.
WBBM (Chicago)-----	November 1, 1952.
WEEL (Boston)-----	April 1, 1954.
KMOX (St. Louis)-----	May 1, 1954.
KNX (Los Angeles)-----	May 1, 1954.

The licenses of plaintiff's four frequency modulation stations will expire as follows:

539 WCBS-FM (New York)-----	June 1, 1954.
WEEL-FM (Boston)-----	December 1, 1952.
WBBM-FM (Chicago)-----	March 1, 1953.
KNX-FM (Los Angeles)-----	December 1, 1953.

WCBS-TV (Chrysler Building New York) will expire on June 2, 1953. WCBS-TV (Empire State Building, New York) is being operated pursuant to special temporary authorization which has been extended from time to time pending issuance of license for operation at that site.

Plaintiff is also the holder of a construction permit for television station KNXT at Los Angeles, California. Said station is being currently operated on a commercial basis pursuant to a special temporary authorization which will expire January 20, 1953.

The licenses of KCBS (San Francisco), a standard broadcast station owned by plaintiff's wholly-owned subsidiary, Columbia Broadcasting System, Inc. of California, expires on November 11, 1952. Plaintiff's said subsidiary also operates KCBS-FM pursuant to special temporary authorization which will expire on March 1, 1953.

The licenses of all radio network stations affiliated with plaintiff will expire within less than three years of the date hereof. The licenses of certain of said affiliated stations will expire during 1952,

and the licenses of certain others of said affiliated stations will expire in 1953.

Plaintiff's stations have a value of many millions of dollars which will be destroyed if its licenses therefor are not renewed. The stations owned by plaintiff's wholly-owned subsidiary likewise have great value which will be destroyed if the licenses therefor are not renewed. So, also, plaintiff's affiliates have very substantial investments in their stations which investments will be destroyed if the licenses of said station are not renewed.

540 Seventeenth: Programs involving the award of a prize to a person whose selection is dependent in whole or in part on chance and which are similar in character to those described in paragraphs eighth to tenth, inclusive, of this amended complaint have been broadcast for about a decade to the knowledge of the Federal Communications Commission. During said period the licenses of literally thousands of stations (including those owned by plaintiff, its subsidiary and affiliates referred to in the amended complaint) broadcasting such programs were renewed by the Commission which knew of the past broadcast of such programs by said stations and that they intended to continue the broadcast thereof.

Eighteenth: This action was instituted on or about the 2d day of September, 1949. By order to show cause signed by Judge Simon H. Rifkind on September 15, 1949, plaintiff moved for injunction pendente lite, and for a temporary restraining order pending determination of the foregoing motion, staying the enforcement of said Order and Rules pending a final determination and decree herein. Said motion for temporary restraint was heard before Judge Rifkind on September 19, 1949, who made an order on September 23, 1949, granting said motion.

On or about the 21st day of September, 1949, the Commission released the following order:

"At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 21st day of September 1949:

"It appearing, That Sections 3.192, 3.292 and 3.692 of the Commission's Rules and Regulations will become effective on October 1, 1949, pursuant to the Report and Order of August 18, 1949 by which they were adopted; and

541 "It further appearing, That District Courts in Illinois and New York have issued temporary restraining orders suspending the effectiveness of the rules with respect to the parties to litigation in such courts who have brought actions to enjoin the rules and that the Commission believes that all parties who might be affected by the rules should be placed on an equal footing by

postponing the effective date of the rules until the final determination of pending litigation involving their validity; and

"It further appearing, That the authority for the postponement made herein is contained in Sections 4 (i), 303 (r) and 309 of the Communications Act of 1934, as amended; and

"It further appearing, That compliance with the public notice requirements of Section 4 (a) of the Administrative Procedure Act is unnecessary in view of the fact that the rules are not yet in effect and this order merely postpones the effective date;

"It is ordered, That, effective immediately, the effective date of Sections 3.192, 3.292 and 3.692 of the Commission's Rules is hereby postponed until a date to be fixed by further order, which shall be at least thirty days after a final decision by the Supreme Court of the United States, or thirty days after the time within which an appeal to the Supreme Court may be taken has expired without such an appeal being taken, in pending litigation with respect to these rules."

Nineteenth: Beginning with the effective date of the Rules, the Commission will consider "Sing It Again" and "Hit The Jackpot" and programs similar thereto as coming within the provisions of subsections (a) and (b) of its said Rules and therefore in violation of Section 1304 of the Criminal Code (18 U. S. C., Sec. 1304) and it will not renew the licenses of plaintiff's and of its said subsidiary's stations and of its affiliated stations when they come up for renewal and it will deny all applications made by plaintiff, its said subsidiary or its affiliated stations for construction permits, licenses or other authorizations for the operation of radio or television stations, unless plaintiff, its said subsidiary and its affiliated stations refrain from broadcasting 542 such programs. In addition, the Commission has the power to revoke, and might revoke, the licenses of said stations prior to their expiration, if said stations were to broadcast said programs or programs similar thereto after the effective date of said Rules.

Plaintiff, its said subsidiary and its affiliates, after the effective date of the Rules, will therefore be unable to broadcast said programs and similar programs which come within the confines of said Order and Rules, although plaintiff desires to do so.

Twentieth: The aforesaid Order and Rules issued on August 18, 1949 are illegal and void and beyond the power, authority and jurisdiction of the Commission for the reasons that:

(a) They incorrectly interpret and apply Section 1304 of the United States Criminal Code;

(b) They are arbitrary, capricious, constitute an abuse of discretion and not in accordance with law;

(c) They are contrary to and in violation of the First Amendment to the Constitution of the United States;

(d) They deprive plaintiff of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States;

(e) They subject plaintiff to punishment without a hearing by any court in violation of Article III of the Constitution of the United States;

(f) They subject plaintiff to punishment without trial by jury in violation of the Sixth Amendment to the Constitution of the United States;

(g) They subject plaintiff to punishment without a judicial trial in violation of Article I, §, Clause 3 of the Constitution of the United States;

(h) They are contrary to Section 326 of the Communications Act of 1934, as amended;

(i) They are contrary to Sections 4 (b), 5 (a), (b) and (c), 7 (a), (c) and (d), 8 (a) and (b), and 9 (a) of the Administrative Procedure Act;

(j) The Commission has no jurisdiction, power or authority to promulgate or effectuate an order or rules interpreting Section 1304 of the United States Criminal Code;

(k) The Commission has no jurisdiction, power or authority to promulgate or effectuate an order or rules imposing or threatening to impose sanctions and penalties for conduct allegedly in violation of but not adjudicated by any Court to be a violation of Section 1304 of the United States Criminal Code;

(l) The Commission has no jurisdiction, power or authority to promulgate or effectuate an order or rules imposing penalties or sanctions for alleged violation of Section 1304 of the United States Criminal Code in excess of or in addition to those expressly provided for by Congress therein;

(m) The Commission has no jurisdiction, power or authority to promulgate or effectuate an order or rules pursuant to which applications for station licenses or for the renewal thereof are automatically denied on the sole basis of a violation of the Commission's interpretation of Section 1304 of the United States Criminal Code;

(n) The Commission has no jurisdiction, power or authority to promulgate or effectuate an order or rules pursuant to which applications for station licenses or for the renewal thereof are automatically to be denied on the sole basis of an unadjudicated violation of Section 1304 of the United States Criminal Code; and/or

(o) The Commission has usurped the Power of Congress, if any there be, to determine the contents of radio and television programs and what sanctions and other penalties shall be imposed for violations of a statute.

Twenty-first: Plaintiff has no adequate remedy at law. Unless said Order and Rules issued on August 18, 1949, be set aside, annulled and the enforcement thereof enjoined, plaintiff and its affiliates must refrain from broadcasting all said programs referred to in paragraphs Eighth to Tenth hereof and programs similar thereto. Plaintiff has suffered and will continue to suffer great loss of revenues, the destruction of its valuable investments and property rights in said programs and the loss of the good will and audiences built up by said programs, all to its irreparable damage. In addition, plaintiff will be unable to broadcast other like programs which come within the proscription of the rules although not violative of Section 1304 of the United States Criminal Code. Plaintiff will thus be barred from broadcasting programs which have wide audience appeal and which furnish substantial revenues.

Wherefore, plaintiff prays:

1. That a court, constituted as required by Title 28, United States Code, Sections 2284 and 2325, be convened, hear and determine this action;

545 2. That said court grant a temporary or interlocutory injunction restraining and enjoining, pending final hearing and determination herein, the enforcement, operation or execution, in whole or in part, of said Order of the Commission issued August 18, 1949, and the Rules adopted thereby;

3. That said court, after final hearing, enter judgment permanently enjoining the enforcement of, setting aside and annulling said Order of the Commission issued August 18, 1949, and the Rules adopted thereby; and

4. That plaintiff have such other further relief as the court may deem just and equitable.

ROSENMAN GOLDMARK COLIN & KAYE,

575 Madison Avenue, New York 22, N. Y.

Attorneys for Columbia Broadcasting System, Inc.,
Plaintiff.

By MAX FREUND, A Partner.

Dated: New York, N. Y., September 22, 1952.

546 [Duly sworn to by Richard Salant; jurat omitted in printing.]

THE COLUMBIA BROADCASTING SYSTEM

SING IT AGAIN

Saturday, August 27, 1949, 10:00-11:00 p. m.

SEYMOUR. Hold the phone, America. It's time to "Sing It Again."

This is Dan Seymour. I'm going to be making calls over the country during the next hour, giving you at home a chance to win the radio's biggest jackpot, \$53,000 in treasure and cash, if you can identify our new phantom voice.

VOICE.

Do you recognize this voice? Just listen.
Stephen wrote,
And I quote,
Blandings paying more,
Wolves will bay,
Donkeys bray,
A phantom walks the floor.

SEYMOUR.

Stephen wrote,
And I quote,
Blandings paying more,
Wolves will bay.
Donkeys bray,
A phantom walks the floor.

Yes. That's the riddle the phantom's sayings, and tonight, his name is worth \$53,000. So, stay by that radio. Stay by that phone. This is Dan Seymour saying—I may call you * * * music * * *

CHORUS. Sing It Again—Sing It Again, etc.

ANNOUNCER. Yes. It's the musical guessing game—
548 "Sing It Again," with Allan Dale, Bob Howard, Rosemary Cluny pinchhitting for Eugenie Bayard, the Riddles, and Ray Block's orchestra. And here's the man with the cross-country phone, Dan Seymour.

SEYMOUR. Thank you. Thank you, Bern Bennett, and welcome everyone to "Sing It Again," where our jackpot is worth \$53,000. A sensational award that you might win tonight by naming our phantom voice. It doesn't matter where you live or who you

are. You may be small in the subway, or tall in the saddle. You may be from a big city or small town. Anywhere in the good old U. S. A. Because on "Sing It Again," big or small, we call them all.

Tonight may be your night to get that all-important telephone call. Yes. \$53,000 in prizes and cash may be yours within the very next hour. So remember that clue we gave you last week.

In a famous song—you'll note,
A fortune hanging by a quote!

O. K. That's the clue. And now let's get those phone calls going. The numbers are chosen at random from our giant collection of United States telephone directories and the riddle ring comes without warning. Yes. The calls begin as we begin to "Sing It Again."

(Music.)

And here's how you go after that phantom treasure. First we sing a popular song then we Sing It Again, naming a person, place or thing. Give me the right answer if I call you and you've won your chance to identify our phantom voice. Name him and the \$28,000 in prizes is yours, in addition you can win \$25,000 in cold, hard cash, if you can answer one question about him.

Yes. That's how we play Sing It Again. And now here's Allan Dale to start us off with a story of the little fish in 549 the big pond.

ALLAN DALE and Chorus. Little Fish In the Big Pond
* * * etc. * * *

SEYMOUR. The riddle words describe a little guy, with a big punch. You guess who we mean and Allan will "Sing It Again."

DALE. * * * drowned out by music * * * indistinct * * *

SEYMOUR. O. K. Operator. Who is going to start Sing It Again this evening, please?

OPERATOR. * * * indistinct * * *

SEYMOUR. Mrs. Annie Clark of Salt Lake City, Utah. Hello, Mrs. Clark. This is Dan Seymour in New York, and here's a chance for you to win a beautiful smartly styled Chiquita suede jacket from Tel-Jacks, of the San Fernando Valley, of California, originators of symphonies in suede.

Ah, but first, Mrs. Clark you have to name that sugary ray for us.

Mrs. CLARK. * * *

SEYMOUR. You don't have any idea who it is, eh? Oh, I'm sorry you don't, Mrs. Clark, but we're going to send you out there in Salt Lake City an Evans golden carry-all with compact, lipstick and compartment for cigarettes and all our thanks for helping us play "Sing It Again" from Salt Lake City.

And, so as is our custom on "Sing It Again"—we now turn to a studio audience contestant, Bern. His name that is Mr. George D. Gregario, from Brooklyn, N. Y. * * * cheers * * *

All right, George, uphold the honor of Brooklyn. Just name that sugary ray quickly will you?

GREGARIO. * * * no voice * * *

SEYMOUR. Oh, audience. * * * shouts * * * indistinct * * *

Sugar Ray Robinson. We said in the parody that "that
550 little ray goes biff bang." That Ray's an iron man because he flattened Steve Beloise last week, and then we added "that Sugar Ray does O. K. making lots of sugar too; he's really great when this welterweight appears."

I'm sorry. Sugar Ray Robinson. No prize. So let's go after another one, Ray. * * * music * * *

And it's time to "Sing It Again," * * * indistinct Bob Howard so bring you a great old tune revived by Al Jolson and just as good as ever. It's Toot Toot Tootsie.

HOWARD. * * * sings * * * Toot Toot Tootsie * * * etc.

SEYMOUR. Second time around Bob tells you about a movie star who leads a dog's life. See if you can guess the star and Bob, you Sing It Again.

HOWARD

Woof, woof, woof, he's a star,
In Hills of Home—he went far.
No other star barks louder,
The only star who has to make up with flea powder,
Woof, woof, woof, he can roam,
How they beg him to come home,
You dog you. * * * [laughter] * * *
* * * indistinct * * *

Something to see.

They said here's an Oscar
And they gave him a * * * indistinct * * *
Woof, woof * * * come out [laughter].
He's a * * * indistinct * * * [laughter].
* * * indistinct * * * [laughter]

SEYMOUR. Hello, operator. Who's going to play "Sing It Again" now, please? * * * [laughter continuing].

Mrs. Edward Carter, of Daytonville, Maryland. Hello, Mrs. Carter. This is Dan Seymour in New York. I hope you
551 answer this because we've got a mighty anxious studio contestant just waiting to take her place up here. You can win the Evans showcase; an ensemble of table lighters, one for every room in the house and the sensationally new Evans automatic

pocket lighter, one for *him* and one for *her*, if you just tell us the name of that picture land pooch.

Mrs. CARTER. * * * No sound * * *

SEYMOUR. You don't know, Mrs. Carter. * * * [laughter—continuous]. Mrs. Carter * * * words drowned out by laughter * * * indistinct * * * [laughter]. We're going to send you an Everlast hand-forged aluminum ice bucket and all our thanks for helping us * * * [Laughter in background throughout] * * * play *Sing It Again* from Daytonville, Md. Well, now, ladies and gentlemen, of our studio audience, I must explain some of the laughter in our studio. This studio contestant has been trying—for the last 2 or 3 minutes—to get everybody in the audience to tell her the answer to this * * * [laughter]. So, Bern, will you please introduce her to our nationwide audience as well as the studio audience?

BENNETT. Yes, Dan. Here is Mrs. Peggy Holland from New York City.

SEYMOUR. Mrs. Holland Miss Holland—be very quiet and at ease up there. Can you give us the name of that picture *Land Pooch*?

HOLLAND. Is that Laddie or Lassie?

SEYMOUR. Lassie. Yes, it is * * * music * * * And the lady almost fainted. * * * [Loud laughter—continuous]. Well, we have a happy studio contestant but no one got a chance at the \$53,000 award that time. But you know someone somewhere is still in line to win our \$28,000 in prizes and \$25,000 in cold, hard cash.

And so here are Bern Bennett and Art Hannes to tell you about some of those wonderful prizes. Go ahead, fellas.

VOICE. A prize for the winner and his family to go deer 552 hunting in Nevada this year or next. You can drive out to

Nevada and be guests of Newton Crumley at one of his famous hotels in Elko, Nevada, either the Ranch Inn or the Commercial Hotel. During your stay you can deer hunt in the famous Ruby Mts. and—lucky or not in your deer hunt—Mr. Newton Crumley will always have ready one of the famous Crumley steers for you to take home; enough steaks to last right through a winter, the same quality meat served at the Ranch Inn and the Commercial Hotel; a nationally famous, nationally guaranteed \$2,000 Columbia diamond ring. Columbia diamond rings are featured by better jewelers from coast to coast and are truly gems for lady America and to match that exquisite ladies' diamond ring, a nationally guaranteed \$500.00 Columbia man's ring; from Leo Stein, the glamour furrier of America, a luxurious mink stole, the last word in fashion and beauty. These carefully selected furs will give you many years of fine wear and it's all yours with

the compliments and best wishes of Leo Stein. An exquisite set of 2 luxurious Longines watches, products of the Longines-Wittnauer Watch Company, makers of the world's most honored watch.

For her—a magnificent Longines \$1,400 diamond and platinum bracelet watch and for him—a handsome Longines platinum watch with diamond dial, valued at over \$500.00; a beautiful Stromberg-Carlson, radio and phonograph combination with AM and FM, plus \$500.00 worth of Stromberg-Carlson table model radio sets, to be distributed in your name among veterans' hospitals. There's nothing finer than a Stromberg-Carlson.

And from J. Keil—Fifth Avenue—a 14-karat solid gold men's jewelry set, consisting of J. Keil's newest broad-flex expansion watch band, with diamond-studded tie clip and cuff links to match.

From Elkhart, Indiana, the home of the world's largest drum manufacturers, medie drums, you'll receive a complete * * * ? finished outfit including all accessories, the same set played by Sing It Again's ace drummerman, Speks Powell. * * * (cheers) * * * words drowned out by cheering. * * * workshop * * *

indistinct * * * ? complete line of shop master tools, designed by engineering experts and including benchsaw, handsaw, drill press lathe and many other woodworking tools, all products of Shop Master, Minneapolis, Minnesota.

Two Delta provincial bedroom suites of authentic beachwood and velvet gold-tone fruit-wood finish by Delta Brothers, manufacturing company, of Henderson, Kentucky.

From the Hastings Metal Tile Products Company, Hastings, Michigan, makers of aluma-tile—a completely equipped modern bathroom tile with Hastings aluma-tile; gleaming aluminum wall tiles and your choice of 14 colors plus enough aluma- * * * indistinct * * * and awnings for every window of your home.

From Chattanooga, Tennessee, you'll receive a complete famous Chavalier furniture—sto-a-way, right-o-way and dressa-way along with a beautiful cedar hope chest, the gift of a lifetime.

From Springfield, Tennessee, we've arranged to fill this chest with luxurious Springfield virgin wool blankets made of the finest blanket wools from Springfield Woolen Mills.

A Modern Kelvinator home deep freezer * * * ? with 6 cubic foot capacity which * * * ? keep filled with a 3-year's supply of Snow Crop high quality fresh frozen foods; a famous Latox ? warm air heating system designed especially for your home by the Lenox Furnace Company, world's largest manufacturers and engineers of warm air heating systems, plus an electro-static air cleaning unit to be connected with your heating system for year-round-use to diminish or remove dirt, dust, pollen and tobacco smoke.

And finally, a prize to bring endless enjoyment and pride to the whole family—a beautiful new Nash Ambassador air flight 4-door sedan, the most modern of America's fine cars.

Of course, that's only half the treasure you have a chance to win. There's \$25,000 in cash as well. And you may get
554 your chance at the \$53,000 award with the call that's starting out right now from the switchboard, so go ahead, Ray.
* * * music * * *

VOICE. While Sing It Again's regular girl friend Eugenie Bayard is off for Canada for an important theatrical engagement, we've invited the shining new singing discovery, Rosemary Cluny, to supply the feminine charm, and here she is with her Columbia recording hit * * * Cabaret.

CLUNY. * * * singing * * *

SEYMOUR. Our riddle verse is all about a gal who brought the Hill Billies to Park Avenue. See if you know her and Rosemary Cluny will sing it again.

* * * a change from the hills of Park Avenue,

* * * tunes like them gals in the Ozarks do.

She did right well by singing a feudin song,
That sure made a fuss.

Feudin, fightin, and a fussin,

Let's all that's going on a-fussin,

Don't like them ornery neighbors down by the creek,

We'll be plum out of neighbors next week.

* * * sings about * * * indistinct * * * and his * * * ?

She's a part of a new mountain * * * indistinct * * *
[applause].

SEYMOUR. Alright, operator. Who wants to try for that phantom award now, please.

OPERATOR. Mr. Carl Dawn ? of Gary, Indiana.

SEYMOUR. Mr. Carl Brown, of Gary, Indiana. Hello, Mr. Brown. This is Dan Seymour of New York, just saying you can win a Lewett? vacuum cleaner. You'll find the Lewett the world's most powerful cleaner. It takes up more dirt, lint and threads, and there's no dust bag for you to empty out there in Gary, Indiana.

To win the vacuum cleaner, name that Park Avenue Hill-Billy for us will you, Mr. Brown?

BROWN. * * * no voice sound * * *

555 SEYMOUR. Dorothy Shaye, right you are. * * * (Music)
* * * [Applause].

All right, Mr. Brown, good going. You've won that vacuum cleaner.

And you've won that wonderful opportunity to try for \$53,000 worth of treasure and cash. Your chance out there to win radio's

greatest jackpot. So, listen—here recorded for you, Mr. Carl Brown, of Gary, Indiana, is our \$53,000 phantom voice.

VOICE.

Stephen wrote,
And I quote,
Blandings paying more;
Wolves will bay,
Donkies bray,
A phantom walks the floor.

SEYMOUR. Mr. Brown, you're first this evening to get this opportunity. Can you identify him for us?

BROWN. * * * no sound of voice * * *.

SEYMOUR. You say it's who, sir?

Oh, you haven't the slightest idea. * * * (Laughter.)

Well, we're still going to send you the wonderful vacuum cleaner you did win. Thank you very much for helping us play 'Sing It Again' from Gary, Indiana. * * * (Applause.)

Well, you know—it's been 4 weeks now since we first heard our phantom voice and no one's come up with the right answer yet. But don't forget the longer the phantom remains a secret, the more help we give you.

Yes. Before the show is over tonight, we'll give you another clue. So, stay by that radio. Stay by that phone, because the next Sing It Again call might be for you. * * * music * * * more * * *.

SEYMOUR. Two is company, three's a crowd, but five is harmony by the Riddlers, who combine talents now to sing, "It's Yes, Yes In Your Eyes."

(Music.)

556 SEYMOUR. And now the Riddlers march in to sing about a man who loved a parade. You guess this man's name and the Riddlers will sing it again.

RIDDLERS.

His marches for touchdowns at the football games they cheer,

Rah, rah * * *

When Lions or Masons at conventions you will hear,

And until * * * when flags wave and grandstands appear,
The whole nation marches, but it's John's march we hear.

(Music.)

(Unintelligible) * * * from ear to ear.

(Music.)

(Applause.)

SEYMOUR. Hello, operator, who's waiting to play Sing It Again now, please?

OPERATOR. Mrs. Bonnie Chidd, of Clarksburg, W. Va.

SEYMOUR. Mrs. Bonnie Chidd, of Clarksburg, W. Va. Hello, Mrs. Chidd. This is Dan Seymour in New York. You're in line to win the brand new, grey Magic Royal portable, just introduced. It's the last work in writing comfort, Mrs. Chidd. This Royal is the only standard typewriter in portable size. And we'll send it to you if you can name that March King for us [pause].

"When Johnny Comes Marching Home"? [laughter]. I'm sorry. That's a very long name. I've never heard him called that before, Mrs. Chidd. No. We're going to send you, tho, an Everlast Danport aluminum ice bucket and all our thanks for helping us play Sing It Again from Clarksburg, W. Va.

And so, an officer from our studio audience, Bern.

BENNETT. Yes, Dan, Mr. R. E. Greene of St. Albans, N. Y. [applause].

SEYMOUR. Well, Mr. Greene, can you name the March King?

GREENE. John Philip Sousa.

SEYMOUR. John Philip Sousa! The wonderful portable is yours. And now we're sending out more calls. Operators from coast to coast are flashing those calls along. So, Ray Block, let's not hold them back.

557 Allan Dale at the helm of this popular ballad. He's charting his course for the "Four Winds and the Seven Seas."

(Music.)

SEYMOUR. Allan gets back on dry land now to impersonate a new and exciting bebop baritone. You tell us who it is and Allan will Sing It Again.

DALE

A new prince of song has come rolling along,

It's Bill and it's Caroline. (?)

* * * stars above that shine * * *

The mystery of that * * * light

That shines upon our Caroline.

(Balance unintelligible.)

(Applause.)

SEYMOUR. Allright, operator. Who wants to try for that \$53,-000 now, please?

OPERATOR. Miss Dorothy Monticello, of Philadelphia, Penn. Hello, Miss Monticello. This is Dan Seymour in New York. I'll bring you a chance to win 48 pounds of delicious hotel bar butter, Miss Monticello. One pound for every week for the next 48 weeks. But first, you'll have to name that Billy that gets top billing.

Billy Eckstein—right you are!

All right, now, Miss Monticello, here's your chance to ride to riches in a beautiful Nash Ambassador air-flight four-door sedan. Here recorded for you down there in Philadelphia, Penna., is Sing It Again's phantom voice.

PHANTOM VOICE.

Stephen wrote, and I quote,
Blandings paying more,
Wolves will bay, donkeys bray,
A phantom walks the floor.

SEYMOUR. Miss Monticello, can you tell us that man's name, please? You're afraid you can't. Oh, I'm sorry. You're not even to guess. We're still going to send you all that wonderful
558 butter, tho. Thank you very much for helping us play
Sing It Again from Philadelphia, Penna.

(Music.)

Okay, folks, make way for a great eastern potentate. Bob Howard's rolling out the red carpet for His Royal Highness, the Maharajah of Magador.

HOWARD. "The Maharajah of Magador."

SEYMOUR. And now Bob sings about a royal twosome, who expects a state visit from a busy bird. You guess what we mean and Bob will Sing It Again.

HOWARD

Princess Rita and Aly have let it out,
That they're going to have something to shout about,
Rita's shopping for cribs, buying bottles and bibs
Aly's getting * * *?, he'll walk the floor.
He'll be a pa, and in the palace you hear a roar.
Oh, how lucky that babykins,
Pearls and rubies on diaper pins,
Sixteen cylinder kiddycar,
And to top it all what a Mamama.
Oh, that royal stork is coming,
From India to Cali-for-n-i-a. [Applause].

SEYMOUR. Yes, operator? Who's going to play Sing It Again now please? Mr. Arnold Swindell of Joplin, Missouri. Hello, Mr. Swindell. This is Dan Seymour in New York. Listen to what you can win for the golfer in your family. I hope it's you, sir. From the Horton Manufacturing Company of Bristol, Conn., originators of the steel gold club shaft, a complete set of men's handsome, precision-balanced golf clubs, the very last word in the art

of fine clubmaking. But, first, tell us what Princess Rita and Aly have announced, would you? (Pause.) They're expecting a baby, that's right! (Applause.) Allright! And we're expecting you to take \$53,000 away from us, if you have the right answer. Here, recorded for you, Mr. Arnold Swindell, of Joplin, Mo., it's
559 our phantom voice.

PHANTOM VOICE.

Stephen wrote, and I quote,
Blandings paying more,
Wolves will bay, donkeys bray,
A phantom walks the floor.

SEYMOUR. How about it, Mr. Swindell? Do you know that man's name? (pause) Aly Kaln [laughter]. No, I'm sorry, Mr. Swindell, that's not the phantom Voice. We're going to send you the wonderful golf clubs you did win, tho. Thank you very much for helping us play Sing It Again from Joplin, Missouri.

Well, all of you keep working on that \$53,000 puzzle. You know, your chance to win radio's greatest jackpot may be along in a minute. Our operators are choosing more names and numbers at random for our huge collection of phone books. And we'll be ready for more calls in just a minute. But, first, here's Bern Bennett with a short reminder.

BENNETT. Yes, Dan, a reminder for everyone to listen to Arthur Godfrey and his Talent Scouts show every Monday. Arthur presents young stars of tomorrow and a show full of comedy and music. And, of course, our man Godfrey just makes himself at home and keeps you chuckling for a whole half-hour. And remember Monday is the hite for Lux Radio Theatre too. So be sure to listen to Arthur Godfrey and his Talent Scouts and Lux Radio Theatre, Monday evenings over most of these same CBS stations.

This is CBS * * * The Columbia Broadcasting System.
(Music.)

ANNCR. Yes, it's the musical quiz game, Sing It Again, with Allan Dale, Bob Howard, Rosemary Cluny, pinch-hitting for Eugenie Bayard, the Riddlers and Ray Block's orchestra. And here-again is that man with the long distance 'phone, Dan Seymour.

SEYMOUR. Population reports: Chicago, Ill., 3,396,808; Ada, Ohio, 2,368. Yes, the Sing It Again calls ring out to the
560 great cities and to the small towns all over America. Big or small, we call them all. If you have a telephone and a radio, here's your chance to win that \$53,000 award—\$28,000 in prizes, \$25,000 in cold, hard cash. So remember that clew: In a famous song you'll note, a fortune hanging by a quote. Yes, that's

the clew, and now our operators have thirty more minutes to choose more names and numbers at random from our nationwide telephone listing. So, let's start the calls and start the music, Ray Block. Let's Sing It Again.

(Music.)

SEYMOUR. Rosemary Cluny makes her second appearance on Sing It Again, with a song about the tomorrow that never quite becomes today. The Spanish have a word for it, "Manana."

CLUNY. Manana.

SEYMOUR. Rosemary takes us out to the ball game to meet a star who's rounder than a baseball and thinks Li'l Abner invented the game instead of Abner Doubleday. You guess who we mean and Rosemary will Sing It Again.

CLUNY

The Yankees have a Yogi who's a rugged Nature Boy,
He might Pile Up his grammar, but his batting is a joy.
He loves to read the comics, for they never strain his brain,
But when the Yogi travels, how his doctor will complain.

Hey Yogi! Hey Yogi! You must wear

Pajamas in air-conditioned trains.

When Casey Stengel told him, "don't just swing at anything,
Each time you pick a ball out, Yogi, think before you
Swing."

Then Yogi said to Casey, "I must be frank with you,
To Hit it one time is more than I can do."

This Yogi, "oh Casey, you're giving me much too much
to do.

How can a guy think and hit at the same time, too?"
[Applause.]

SEYMOUR. Okay, operator, who's ready to start the second half of Sing It Again, please, Mrs. Arthur Nelson, of Raymond, Washington, Hello, Mrs. Nelson. This is Dan Seymour in New York. We have a fine prize for your home in Washington: custom-made Artercraft all-metal venetian blinds, in your own choice of decorators' colors, for any three rooms of your home in Raymond, made especially for you by Artercraft of St. Louis. Now, the blinds are yours, Mrs. Nelson, if you've got a Yogi handy who isn't an Indian. Got the answer to that last parody? (Pause.) Yeah, I want the Yogi's last name, that's right Mrs. Nelson. He's a ball-player. You're doing very well so far. You just have to give me his name. Mrs. Nelson. Is it Carmichael? [Laughter.] That is a Bear, Mrs. Nelson, not a Yogi. No, I'm awfully sorry. We're going to send you, tho, a handsome * * * travelette alarm clock, made by the celebrated Macombre Watch Factory,

makers of the most exceptional watches and clocks in all the world. And all our thanks for helping us play *Sing It Again* from Raymond, Washington. And so, a gentleman from our studio audience.

BENNETT. Dan, from Summit Hill, Penna., here is Mr. Paul Johnson.

SEYMOUR. Mr. Johnson, can you name that Yogi who isn't an Indian?

JOHNSON. Yogi Berra [applause].

SEYMOUR. All right now. Stand by, you may hear the phone ring in the next few minutes. So listen—it might be *Sing It Again*. Allan Dale has learned learned many a romantic song, but he admits that no matter how hard the song writers try, there's just one way to say *I Love You*.

ALLAN DALE. "I Love You."

SEYMOUR. There's only one way to answer our riddle verse. You try to locate a romantic city on the Blue Danube—and Allan will *Sing It Again*.

DALE.

This city was pretty when Strauss was the King,
They'd waltz and they'd sing, romancing.
They'd waltz and they'd sing, romancing
It's river a-quiver with moonlight and stars
Inspire these bars to dancing.

When they went to dine,
Wiener schnitzle was fine,
562 And the hofbraus were crowded till dawn,
They'd cheer in their beer,
When they'd get Johann Strauss,
To play Fledermaus till morning,
The whole world (a darker city).

[Applause.]

SEYMOUR. Hello operator, who's ready to answer that one for us please?

OPERATOR. Mrs. Irene Chambers of Springfield, Illinois.

SEYMOUR. Mrs. Irene Chambers of Springfield, Illinois. Hello, Mrs. Chambers. This is Dan Seymour in New York. If you give us the answer to the riddle, you can win a new polaroid lensed camera and here's what you do with it, Mrs. Chambers. Just click the shutter, press the button, pull the tab, wait only 60 seconds, open the back door and there's the finished, album-sized picture. But before the camera is yours, you'll have to name the waltz capital for us, Mrs. Chambers. The waltz capital, yes.

Quickly, Mrs. Chambers, I'm awfully sorry. There's an awfully lot of people waiting to be called tonight. No answer. What? No answer! Oh, I'm sorry. We're going to send you though the tiny micropedal camera you've read about in Life magazine. You wear a pedal on your lapel, no bigger than half a dollar, it takes pictures three times its own size. All our thanks for playing "Sing It Again" to Springfield, Ill.

And a lady from our studio audience.

BENNETT. And her name is Catherine Rozansky from Scranton, Penns.

SEYMOUR. Welcome to "Sing It Again." We have a wonderful prize we'd like to see you take back to Scranton. Can you name that waltz capital for us?

ROZANSKY. I'd say Germany. I'm taking a chance.

SEYMOUR. Oh, no! Audience!

[Audience noise.]

SEYMOUR. Vienna! The beautiful city on the Blue Danube. Oh, I'm afraid that camera is going to stay right put on "Sing It Again." Let's try to get another winner now, though. How about it, Ray? Music.

BENNETT. Time to swing it again with "Sing It Again." Bob "Beat it Out" Howard and "I Never Knew I Could Love Anybody."

(Music: "I Never Knew I Could Love Anybody" by Bob Howard.)

[Audience applause.]

BENNETT. Bob still has love on his mind now as he spotlights a front-page romance. You guess gentleman involved and Bob, you "Sing It Again."

HOWARD

They say that Alben is going out steady,
 Keeping steady company,
 They say that our VP,
 Down in Old DC,
 Found a lovely bride-to-be,
 Now if they walk through that arch,
 They say that Harry's going to play The Wedding March,
 He's got all Washington askin' him Alben,
 Is you is or is you ain't? Dear Alben. Is you is or is you ain't?

[Audience laughter, applause, etc.]

SEYMOUR. Hello, operator. Who got the "Sing It Again" ring this time, please?

OPERATOR. Mrs. Leila Underwood of Montgomery, Alabama.

SEYMOUR. Mrs. Leila Underwood of Montgomery, Alabam. Hello Mrs. Underwood. This is Dan Seymour in New York offering you a glorious three week vacation for two in Lake George, including round-trip transportation from New York; one week each at the Thousand Acres Ranch, Top of the World Hotel and The Trout House. Captain George Mains of the Adirondack Chamber of Commerce, Lake George, New York, will personally see that you have a wonderful time, Mrs. Underwood, if you'll just tell us who's fixin' to get hitched?

What do you say, please? Is it Van Johnson? [Audience roars.]

564 I'm afraid not, Mrs. Underwood. I'm awfully sorry though. We are going to send you a Westinghouse iron for all your chores down there in Montgomery, Alabama. Thank you very much for helping us play "Sing It Again." And so, a member of the government from our studio audience. Bern?

BENNETT. Yes, Dan. From the "USS Barton" Seaman Howard Martinson [applause].

SEYMOUR. Can you tell us who's fixin' to get hitched?

MARTINSON. Alben Barkley.

SEYMOUR. That's right!! [Applause, music.] Well, that wasn't the answer we were looking for on the telephone. We had to get it, after a fashion, from our studio contestant. But in case we do get the answer to the riddle and the phantom voice on the next call, let's hear about the rest of the prizes in store for the winner. Here are Bern Bennett and Art Hannes to describe 'em for us.

ANNOUNCER. A one thousand dollar Krakauer spinet piano sprinkled with stardust. Yes, the same piano which Ann Blythe played on the set of Universal International Studios during the filming of the comedy "Come Once More My Darling" co-starring Robert Montgomery and Ann Blythe.

ANNOUNCER. Five hundred dollars worth of famous Flag Brothers shoes for the men in your family and five hundred dollars worth of Flag Brothers shoes to be distributed to veterans hospitals in your name. Flag Brothers, shoes, authentically styled men's shoes in your choice of styles and sizes, made of flexible, tough, longhorn leather, assuring you of higher shine and longer wear.

ANNOUNCER. Ten thousand cans of Phillips' delicious soups, vegetables, and meat products. Forty different varieties of canned goods from quality Controlled Kitchens. From the Phillip's (Packing?) Co. a * * * * *

ANNOUNCER. An all expense-paid trip to New York as guests of the Knott Corporation. You'll leave your home for two won-

derful weeks of wonderful living at either the famous McAlphin Hotel or the luxurious New Weston in New York City. Or you may choose from distinguished Knott hotels in eastern cities.

ANNOUNCER. And for your trip a complete ensemble of Amelia Earhart luggage, of top-grain cowhide, in the new pastel travel color, the exciting Parisian pink shade, distinctive for Amelia Earhart luggage.

ANNOUNCER. A lifetime supply of Corday perfume, one thousand dollars worth of Corday's famous French perfume of lasting fragrance. Cherished perfume such as Toujours Moi, Jet and Fame.

ANNOUNCER. A completely fitted Evans handbag with the sensationally new automatic lighter. The purse in this bag will be of special interest because it will contain a one thousand dollar savings bond. All of this will come to you with the compliments of Evans Handbags and Automatic Lighters.

ANNOUNCER. From New York's leading sweater designer, Jay Norwill, twelve beautiful knitted dresses plus 18 sweaters with 18 matching skirts. These Jay Norwill originals, designed to be lived in, will give you over 300 interchangeable ensembles.

ANNOUNCER. Fifteen handmade * * * needlepoint pieces for your living room and dining room, valued at over one thousand dollars. These pieces are imported directly from Austria and have been carefully chosen from needlepoint pieces from the world famous Jay (Jands?) studios of New York, Shanghai and Vienna.

ANNOUNCER. A fabulous Rembrandt television receiver with Rembrandt tone-pure FM radio, * * * * * to perfection with Rembrandt's famous 121 square inch crystal clear picture; Rembrandt television, truly a masterpiece! Plus an Alliance Telerotor which provides perfect reception in any direction.

ANNOUNCER. Whole silver service for twelve including twelve place-settings plus serving pieces from Easterling's Sterling Silver master craftsman in silver.

ANNOUNCER. A gold-plated deluxe Gem razor set and a five year supply of Gem blades. Gem will also send 500 deluxe Gem razor sets to any veterans hospital you name.

566 **ANNOUNCER.** And, finally, don't forget the prize that will thrill and delight the whole family. A beautiful new Nash Ambassador Airflight, four door sedan, the most modern of America's fine cars. Yes, all that's just a part of what you can win if you have the lucky answer and don't forget the twenty-five thousand dollars in cash.

You know we might find the winner of the Phantom Award with our next call, so let's get the game rolling. Yes, let's "Sing It Again." [Music.]

Allan Dale doesn't waste much time. Here he is trying to get a date with Rosemary Cluny. The idea seems to be a stroll around the park. Would you like to take a walk?

(Song: "Would Ya Like To Take a Walk?")

ANNOUNCER. This time Allan and Rosemary would like you to name a famous pair who met their Waterloo. You guess who and Allan and Rosemary will "Sing It Again."

CLUNY

Knock, knock, knock it's your Josie at the door,

DALE

Oui, oui, oui, you're so busy little Nappy,
That's why I'm unhappy,
Don't you love your sweet chérie?

DALE

Oh, oui, oui,
Wellington has my army on the run,
Josie dear, pack my tooth brush and a gun.

CLUNY

That's like you, never time to see the missus,
Never make with kisses,
All you make is history.

DALE

I was once a corporal, now I'm an emperor,
Because I work.

CLUNY

Bonaparte, the greata,
I'm here to state you're
A Jerk.

567

DALE

A Jerk!
Knock, knock, knock, not tonight my Josephine.

CLUNY

Not tonight, that is all I ever hear
Well all right, I suppose I'll see you later.

DALE

Bye now, sweet pertater
Got to fight at Waterloo.

CLUNY. You'll be sorry.

BOTH. See you after Waterloo. [Applause.]

SEYMOUR. OK operator. Who got the lucky "Sing It Again" call that time please?

OPERATOR. Mrs. Thomas Hickey of Mechanicville, New York.

SEYMOUR. Mrs. Thomas Hickey of Mechanicville, New York. Hello, Mrs. Hickey. Hello. This is Dan Seymour in New York City, Mrs. Hickey. You can win an attractive solid gold Wittenauer watch, distinguished member of the Longine Wittenauer family of fine watches if you just tell us the names of that little corporal and his wife, please. Tell us the name of the Little Corporal, and his wife, Mrs. Hickey. George Burns and Gracie Allen? [Audience laughter.]

I'm sorry, Mrs. Hickey. That's not right. We are going to send you though to beautify your living room in Mechanicville, N. Y., the sensationally new Evans automatic table lighter. Thank you very much for helping us play "Sing It Again."

And so, our studio contestant. A very charming lady, Bern.

BENNETT. Dan, her name is Mrs. Helen Ferber from Jersey City, N. J. [Audience noises.]

SEYMOUR. Well now perhaps you can help us. Can you name that Little Corporal and his wife?

FERBER. Napokon—is it something like that * * *?

SEYMOUR. Audience?

AUDIENCE. Napoleon.

SEYMOUR. Napoleon and Josephine. "Knock, knock, 568 knock, it's your Josie at your door * * * You're so busy little Nappy * * *" that's what we sang. He says "I was once a corporal, now I'm emperor * * *." Bonaparte the great. "No, no, knock, knock, not tonight my Josie dear." I'm sorry. No prize. So let's have another tune, Ray Bloch. [Music.]

ANNCR. Step right up, folks. A free ride if you can get the brass ring. Climb up on one of our beautiful horses and listen as the Riddlers sing, "The Merrygoround Waltz."

(Song: The Merry-goround Waltz.)

ANNCR. The Riddlers go around for another verse. This time they describe a lady who carried the torch. You guess her name and Riddlers, you "Sing It Again."

One lady we love as a symbol of our USA
She stands high above with a freedom torch
Lighting our way.
Out there in the bay, it's a message for all men
To see
Give me your tired, your poor, your huddled masses
Yearning to breathe free.

The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me.
I lift my lamp beside the golden door.
She stands at the gate of the home of the brave and
The free.

SEYMOUR. Hello, operator. Who wants to play "Sing It Again" now, please?

OPERATOR. Mrs. Lawrence Norgard of Omaha, Nebraska.

SEYMOUR. Mrs. Lawrence Norgard of Omaha, Nebraska. Hello, Mrs. Norgard. This is Dan Seymour in New York. Here's a prize any home can use. A deluxe (Pentwater?) Picnicook, a complete outdoor barbecue from the Pentwater Machinery Co.,

Pentwater, Michigan. Now it's all yours, Mrs. Norgard 569 if you can tell us who stands "beside the golden door."

I know you said yes, but I want the answer, Mrs. Norgard. That's the what—the what—what, what did you say? The Statue of Liberty! That's right. Of course! [Fanfare.]

All right now, Mrs. Norgard, out there in Omaha, Nebraska. Opportunity is knocking at your door, to the tune of fifty-three thousand dollars. Here recorded for you, is your phantom voice.

PHANTOM VOICE

Stephen Wrote, and I quote
Blandings paying more,
Wolves will bay, donkeys bray.
A phantom walks the floor.

SEYMOUR. Mrs. Norgard can you give us that man's full, correct name please? Yes. You want to hear him again. [Laughter.] Oh, I'm sorry we can't do that, Mrs. Norgard, and you haven't any guess. We're still going to send you the wonderful prize you did win, though. Thank you very much for helping us play "Sing It Again" from Omaha, Nebraska.

Well, I'm afraid that will have to be all the calls for tonight, but now it's time to give you that clue I promised you, the clue that may give you the answer to our phantom voice. Listen! A band, a night club, a baseball bat, can drop a fortune in your hat.

Yes, that's the clue and now the Phantom Award is ready to peg a new high. I'll tell you about that in just a minute. First, though, I'd like all of you to hear that all-important voice once more. Here, recorded for all America is our phantom voice.

PHANTOM VOICE

Stephen wrote, and I quote
 Blandings pay more,
 Wolves will bay, donkeys bray
 A phantom walks the floor.

SEYMOUR

Stephen wrote, and I quote
 Blandings paying more,
 Wolves will bay, donkeys bray
 A phantom walks the floor

570

Yes, these are the words that will mean a fortune to someone, including our new addition to the jackpot. Two prizes. First, a sportsman's dream come true. A wonderful outdoor prize from the Baxter Miles Manufacturing Co. of Leno, Arkansas, a Jimmy B. roverboat and to go along with that boat—listen all you fishermen—a complete line of Wright & McGill fishing tackle for every member of your family, including a world famous Wright & McGill (granger deluxe) split cane flyrod, Wright & McGill fishing coils, casting rod and eagle clawed snail hooks all from the Wright & McGill Co. of Denver, Colo., plus a five hundred dollar wardrobe of Goody-made suits, featuring the famous custom tailored (Bellows) pockets and Don MacDonald topcoats, tailored by Goody-made, all from the quality famous Goody-made Company.

And with those two prizes our phantom award jumps up to fifty-four thousand dollars. Fifty-thousand dollars worth of treasure that you may win next win. So once again I'm going to give you the clue that we added tonight in our search for your phantom voice. Remember, A band, a night club, a baseball bat, can drop a fortune in your hat.

And now this is Dan Seymour saying get to work on that clue because next week, I may call you. [Music.]

ANNCR. "Sing It Again" featuring Dan Seymour, Allan Dale, Bob Howard, Rosemary Cluny pinch-hitting for Eugenie Baird, the Riddlers and Ray Bloch's orchestra is produced by Lester Gottlieb and directed by Bruno Durato, Jr. Original "Sing It Again" lyrics are by Hi Derry (?) Jimmy Sherrill, Irvin Drake, Bill Stein, and Albert Tilman. And now, this is Bern Bennett speaking and reminding you to listen Monday night to "My Friend Irma" starring Marie Wilson. Irma is the dizziest girl on the radio and she always gives you one laugh riot after the other. Be sure to listen to "My Friend Irma" every Monday evening and listen, too, to the Lux Radio Theater also heard on Monday over most of these same CBS network stations. This is CBS—the Columbia Broadcasting System.

572

Exhibit II to amended complaint

COLUMBIA BROADCASTING SYSTEM

HIT THE JACKPOT

Tuesday, August 23, 1949, 10:00-10:30 p. m.

ANNCR. Okay, USA, get set to play * * *. [Music.]

North, south, east, west, calls going out now all over America—maybe to you! Tonite, a fortune in fabulous prizes for the exact words of the secret saying. Tonite, maybe you can play and win by phone from your own home, as the DeSoto-Plymouth dealers of America invite you to Hit the Jackpot. [Applause.]

(Music.)

CHORUS

It's true, true, true DeSoto service is great

Now, you, you, you better sign and don't wait and don't forget all dealers who sell DeSoto,

Sell you Plymouth as well.

It's true, true, true, in the right places, too (?)

The Plymouth—So be sure to see your DeSoto-Plymouth dealer.

ANNCR. Things are a lot different these days than they were just a while ago, aren't they? We realize that almost every time we go shopping. The customer gets treated a lot more courteously now than before. But there didn't have to be any change in the attitude of the DeSoto-Plymouth dealers toward their customers, because courtesy always was a watchword with them—and it still is. The folks at your DeSoto-Plymouth dealers, those in the shop and those in the office like to see a customer pleased. So it's their aim every day to treat customers with the respect they deserve, to do the best work they know how. And DeSoto-Plymouth dealers charge fair prices for the work they do for you. So you see there's been no change at all in their attitude toward you as a customer. Whether you're in the market for a new car, a used one, or just a simple repair job, come in and see what a grand place it is to do business. And remember you can see the new Plymouth
573 at all authorized DeSoto-Plymouth dealers.

CHORUS. So be sure to see your DeSoto-Plymouth dealer.

ANNCR. And now, get set for fun, get set for phone calls, get set to Hit the Jackpot, with the King of bluff and challenge * * * Bill Cullen. [Applause.]

(Music.)

CULLEN. Thank you, thank you, George Bryan. Hello, everybody—and welcome to the DeSoto-Plymouth Hit the Jackpot.

Well, we had plenty of excitement last week when we landed a jackpot winner. Yes, Billie Joe Clather (?), of Knoxville, Tenn., gave us the exact words of the DeSoto-Plymouth secret saying and won our giant jackpot, bulging with wonderful prizes, including that beautiful new DeSoto sedan. Nobody loves the fat man with the words that Hit the Jackpot for him (?) Tonite we're going to make phone calls and more phone calls to every part of the United States, looking for our next Jackpot winner. Maybe it will be you. So I'll start things rolling with our first phone call. George!

BRYAN. Well, it's right on your wire, Bill. Our CBS operators have just gotten thru to Mrs. Mary McGinnis of 945 Music Street, Scranton, Penn.

CULLEN. Oh, hello, Mrs. McGinnis in Scranton. How are you? Mrs. McGinnis we're going to give you the clues to our brand-new DeSoto-Plymouth secret saying, and if you can give me the right answer you'll win every prize in our new jackpot. Now, are you ready over there, Mrs. McGinnis? All right, get set to hear the clues and listen closely, because—here they come.

VOICE. Here's a clue to the first word of the secret saying.

SPEAKER. * * * (unintelligible). How about my cigar?

2ND SPEAKER. What do you mean, "cigar"? Here are five cigars.

VOICE. Now here's a clue to one of the key words. [Sound.]

VOICE. And now a clue to the last word.

574 BARKER. All right, step right up, folks. Watch the little pig * * * now it's here, now it's there. Watch the little pig and remember—the hand is quicker than the eye.

CULLEN. All right, now, Mrs. McGinnis, you have all you need to figure out the answer. Millions of people are waiting to hear what your answer will be, because if you miss there'll be more phone calls going out thruout the United States. So may I have your answer to our new DeSoto-Plymouth secret saying? [Pause.] What did you say, mam? What's your answer? Would you give it to me again? "The Grand Old Army." No, that isn't the answer, but for making such a good try, we'll see that you receive a lovely Benrus Embraceable wristwatch with the best wishes of your friendly DeSoto-Plymouth dealer, who brings you Hit the Jackpot.

All right, George, how about another home player?

BRYAN. Why sure, Bill. Here's Mrs. Emma McCarthy of 2042 West Seventh St. in St. Paul, Minn.

CULLEN. Oh, good old Minnesota. Hello, Mrs. McCarthy. Mrs. McCarthy, for every one of the marvelous prizes in our new jackpot, what do you say is the DeSoto-Plymouth secret saying?

[Pause.] May I have your answer? Oh, I'm sorry. That's a wrong answer. But, I'll tell you what, for a good try, we'll see that you receive a year's supply of ice cream sundaes, 52 quarts of ice cream, six sundae glasses, 144 cans of famous Topflight toppings in six delicious flavors, and a walnut, compliments of the DeSoto-Plymouth dealers, who bring you Hit the Jackpot. Good-bye!

(Music.) [Applause.]

CULLEN. All right, operators, I'll want more phone calls very soon, but right now, I think it's time for some bluff and challenge.

BRYAN. Right, Bill. And here's Bob Niehoff of Milwaukee, Wisconsin, our first climber for tonite. And Mrs. Martha Herrgot of Peoria, Ill., is first challenger.

CULLEN. All right. I'll say hello to Mrs. Herrgot. Is that correct?

HERRGOT. That's right.

575 CULLEN. All right, I'll talk to the ladies first. How are you, Mrs. Herrgot?

HERRGOT. Fine, thank you.

CULLEN. Well, we're happy to have you here from Peoria, Illinois. And Bob Niehoff, where are you from, again, Bob?

NIEHOFF. Milwaukee, Wis.

CULLEN. All right, what do you do, Bob?

NIEHOFF. I'm a bank teller.

CULLEN. What do you do, Mrs. Herrgot?

HERRGOT. I'm a secretary to the sales manager.

CULLEN. All right. That sounds like fun on both counts. Get ready, both of you, because now, Bob Niehoff, you're going to try for a wonderful Keystone home movie outfit, the famous Keystone camera, projector, screen and film. And this is a bit of a musical question. You stand by, Mrs. Herrgot, to accept or challenge. Al Goodman and the DeSoto-Plymouth orchestra are going to play two songs for you now, Bob. These songs have something to do about the seasons of the year. Listen real closely and then get ready for a question. Okay, Al! [Music.]

CULLEN. All right. That was No. 1. Now here is No. 2. [Music.]

CULLEN. All right. And here's the question. Do these songs refer to the same season or to different seasons of the year, Bob?

NIEHOFF. The same season.

CULLEN. The same season. Do you accept or challenge, Mrs. Herrgot.

HERRGOT. I challenge.

CULLEN. And you challenge correctly. The Keystone home movie outfit is yours. You become our player. You're up there

on step No. 1. [Applause.] The answer to that one naturally was different seasons. One was "Younger Than Springtime"—that's spring; and the other, "Baby, It's Cold"—that's winter, or we can even get closer with fall. That was the answer
 576 we were looking for. George, do we have a new challenger for our new climber, Mrs. Herrgot, over here?

BRYAN. We do, Bill. It's Mrs. Rosemary Track of Jackson Heights, N. Y.

CULLEN. Hello, Mrs. Track. Say hello to Mrs. Herrgot, if you will.

BOTH. How do you do?

CULLEN. All right. That takes care of the formalities. Get ready, Mrs. Herrgot, here comes your question. You're trying for step No. 2 on your way to a try at that DeSoto-Plymouth jackpot, and a famous Tappan gas range with a visualite oven, a divided top and a Tappan teluset. And here's your question: When a farmer speaks of a heifer, is he talking about a male or a female animal. Don't anybody help.

HERRGOT. Female.

CULLEN. Female. Do you accept or challenge, Mrs. Track. TRACK. Challenge.

CULLEN. Oh, you should have accepted that time, because that answer was right. That retires you from the game. Mrs. Herrgot, you're on step No. 2 and you get the gas range. You're doing all right. [Applause.] Good for you, Mrs. Herrgot. George, who do we have up there as a challenger?

BRYAN. Here's Jay Drubb of Philadelphia, Penna., Bill.

CULLEN. Hello! Drubb, is that right?

DROBB. Drobb!

CULLEN. Drobb! All right, Mr. Drobb. Say hello to Mrs. Herrgot over there.

DROBB. Hello.

CULLEN. Everybody's introduced. We're going to give Mrs. Herrgot a chance now for that third step and a week's vacation for two at Miami's luxurious Cadillac Hotel, right on the ocean. Now you're going to fly round-trip to Miami on a National Air Line's giant DC-6, National's famous non-stop, four-hour flight. And here comes your question. Listen carefully, because Al Goodman and the orchestra have some fascinating Latin American music for you. And then, I'm going to have a nice, fascinating little question for you. It's all yours, Al.

577 CULLEN. All right. Now here's that fascinating little question. If you were dancing to that music, would you properly, Mrs. Herrgot, be doing a tango, a rumba or a samba? Which would you be doing?

HERRGOT. A rumba.

CULLEN. A rhumba. Do you accept or challenge, Mr. Drobb?
DROBB. Challenge.

CULLEN. And you challenge correctly, sir; the answer should have been samba. You get that two weeks' vacation at the Cadillac and you're on step No. 3. [Applause.] Thank you, Mrs. Herrgot, for being with us. All the prizes that you've won are already yours. And, as I said before, the answer was samba. Mr. Drobb, you're our brand-new climber. George, who's our brand-new challenger?

BRYAN. Joe Matthews of Goldsboro, N. C., Bill.

CULLEN. Hello, Joe from Goldsboro. Come on out here and say hello. What do you do in Goldsboro, Joe.

MATTHEWS. I'm up here to arrange about the importing of monkeys, from the West Indies.

CULLEN. Importing of money?

MATTHEWS. Monkeys.

CULLEN. Well, the same thing, practically. All right. [Laughter.] You and Jay over there * * * get ready, because this is a real big question for the two of you. And the answer to this one has to be right to earn you your chance to Hit the Jackpot. No bluffing on this one at all. If you miss, then on to more phone players all over the U. S. A. Now, Mr. Drobb, you're trying not only for a chance at the DeSoto-Plymouth jackpot, but you're trying also for a shiny Leonard home freezer that holds over 200 pounds of frozen foods: it's * * *! by the famous Leonard Glacier Seal Unit. And here comes your question. Get ready. We have a five-second time limit. There are four time zones across the United States. Into how many time zones is the whole world divided? Go! You have three seconds.

DROBB. Eight.

CULLEN. Eight. Do you accept or challenge, Mr. Matthews?

578 MATTHEWS. I challenge that.

CULLEN. And you challenge correctly, Mr. Matthews. The shiny, Leonard home freezer belongs to you, sir. [Applause.] All right, now. That was the correct challenge. I'll tell you what. To earn your chance to Hit the Jackpot, you have to give me the correct answer to the question; what is the correct answer, Mr. Matthews? Don't anybody help, or we'll have to give a new question. Mr. Matthews what's the correct answer?

MATTHEWS. Throughout the world.

CULLEN. Yes. You have five seconds. Four. Come on. Three. Two.

MATTHEWS. Five.

CULLEN. Five. No, I'm awfully sorry. I'm terribly sorry. The correct answer I'll tell you right now: 24—one for each hour of the day. You do, however, Mr. Matthews, get a chance to keep that home freezer. And since neither of our studio players gave me the right answer, I'll tell you what—that means a phone player from home gets next chance to Hit the Jackpot. [Applause.] (Music.)

CULLEN. Well, let's see, both of your studio players knocked themselves out on that last question. So now more phone calls, all over the U. S. A. Operators get me as many phone players on the line as you can. In the meantime, listen to some of the wonderful prizes we've got in our new DeSoto-Plymouth jackpot.

BRYAN. First of all, you go on a trip to stir your wildest imagination. You take a leisurely voyage to the Mediterranean, aboard a comfortable Leitz sea-type cargo liner, visiting lands of history, mysterious North Africa and the exotic Near East, guests of Leitz Brothers Steamship Line.

ANNOUNCER. And you'll pack your belongings in a wonderful collection of famous Windship Luggage, made by the Windship Luggage Company of Utica, N. Y., the only luggage with the wonderful dress carrier.

BRYAN. Then, so you'll be well dressed for every occasion, here's a fabulous wardrobe of smart Simson men's clothing, custom tailored of the finest materials by famous J. B. Simson, Inc.

ANNOUNCER. And here's fun for the whole family—a 120-579 base Gallanti (?) Bros. featherweight accordion, famous for exquisite tone and accurate scale. And, listen to this, Gallanti Bros., outstanding makers of piano accordions, will see that you and every member of your family receive accordion lessons for a whole year.

BRYAN. And here's that prize of all prizes—the car designed with you in mind, the car that lets you drive without shifting—a beautiful brand new DeSoto four-door custom sedan.

(Music.) [Applause.]

BRYAN. All right, Bill. Here's another phone call, to Mrs. Joseph Durra, of Bellaire Road, Cleveland, Ohio.

CULLEN. Oh boy! Hello, in Cleveland, Ohio, to you Mrs. Durra. How are you? I'm happy to be talking with you. And I'll tell you what, I'm happy to give you a chance to Hit the Jackpot. Listen closely while we give you the clues to the DeSoto-Plymouth secret saying, because they hold the key to the answer. Get set, Mrs. Durra, because here come the clues.

(Clues—same as page 2.)

CULLEN. All right, now for your answer. If you miss, then more phone calls all over the U. S. A. What is your answer, Mrs. Durra? What did you say, again, please Mrs. Durra? All or nothing at all! Oh, that's wrong, I'm sorry. So, operators, get me another phone player. And for a good try, Mrs. Durra, you're going to receive all * * * [unintelligible]. It locks into position with a flick of the finger—compliments of your friendly DeSoto-Plymouth dealer who brings you Hit the Jackpot. And, operators, keeping your lines humming. Get me as many phone players as you can. But, first, I'd like to remind you that the employees of the Chrysler Corp., dealers, its advertising agency, the network and members of their immediate families aren't eligible to play Hit the Jackpot but you other folks can get the opportunity to be called by sending a postcard. Put on it your name, your address and your phone number, mail it to DeSoto-Plymouth Hit the Jackpot, CBS, 485 Madison Avenue, New York 22, N. Y.

If you live within the continental limits of the United States 580 and you'd like to try to Hit the Jackpot during August, mail your August postcard now. Cards mailed before August are no longer good.

And right now, let's see if we're ready with more phone calls.

BRYAN. Oh, we are, Bill. There are lots more on the line. Here's one to Mrs. Mildred Federickson of Earl Street, St. Paul, Minn.

CULLEN. Hello, Mrs. Frederickson. Give me the right answer to the DeSoto-Plymouth secret saying and you'll Hit the Jackpot for a fortune in prizes. Let me see if you can do it. Go ahead. All right. [Pause.] "What this country needs is a good five-cent cigar." That's a great idea, but the wrong answer. Operator, get me another phone player. For trying, we'll send you a chest of famous Gorham silver plate, 52 pieces, in your choice of pattern—and a five-cent cigar, compliments of your DeSoto-Plymouth dealers, who bring you Hit the Jackpot.

George, have you got another phone call?

BRYAN. You bet, Bill. Say hello to Miss Annie Dell Peacock of Lucky Street NW., Atlanta, Georgia.

CULLEN. Well, hello, Miss Peacock, of Lucky St. NW., Atlanta, Georgia, how are you? All right. Miss Peacock, what do you say is the DeSoto-Plymouth secret saying? We'll give you ten seconds for the exact words. Go ahead. Hello, Miss Peacock, what is it? Hey, Miss Peacock! Hey! Anyone know a peacock birdcall? I'm awfully sorry. That's not the right answer, but * * * (balance of recording blank).

Ediphone trans./E. Scheiner.

600-601 In United States District Court

Civil Action No. 52-38

[Title omitted.]

[File endorsement omitted.]

Notice of motion

Filed September 24, 1952

SIRS: Please take notice that upon the amended complaint herein, the stipulations between the parties, dated September 22, 1952, the affidavit of Max Freund verified the 22nd day of September 1952, and all the other papers and proceedings heretofore filed and had herein, plaintiff will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as the Court may designate for summary judgment granting the relief demanded in the amended complaint, pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts, on the ground that there is no genuine issue as to any material fact and that the plaintiff
602 is entitled to judgment as a matter of law.

Dated: New York, New York, September 22, 1952.

Yours, etc.,

ROSEMAN, GOLDMARK, COLIN
& KAYE,

Attorneys for Plaintiff.

By MAX FREUND,

A Member of the Firm.

To: Attorney General of the United States, Washington, D. C.;
United States Attorney for the Southern District of New York,
United States Courthouse, Foley Square, New York, N. Y.; Fed-
eral Communications Commission, Washington, D. C.

603 *Affidavit in support of motion for summary judgment*

STATE OF NEW YORK,

COUNTY OF NEW YORK.

Southern District of New York, ss:

Max Freund, being duly sworn, deposes and says:

1. I am a member of the firm of Rosenman, Goldmark, Colin & Kaye, attorneys for the plaintiff in the above-entitled action. I am fully familiar with all the proceedings heretofore had in this action.

This affidavit is made in support of plaintiff's motion for a summary judgment herein.

I refer to plaintiff's amended complaint, verified by Richard Salant, upon which this motion is likewise based, for the basic facts involved in this action.

2. On information and belief, I believe the facts stated in this affidavit to be true.

3. On December 30, 1943, Chairman Fly of the Federal Communications Commission wrote to Senator Wheeler, Chairman of the Senate Interstate Commerce Committee, proposing remedial legislation by Congress which would have specifically extended the coverage of the broadcast lottery provision to those programs which offered prizes to the radio audience. A copy of said
604 letter is annexed hereto as Exhibit A. The suggested legislation was never adopted.

4. Clef, Inc. v. Peoria Broadcasting Co., decided in November, 1939, in the Circuit Court of Peoria County, Tenth Judicial District, State of Illinois, passed on the legality of a radio program known as Mu\$ico which was broadcast over station WMBD in Peoria (owned by the Peoria Broadcasting Co., defendant in the action). It was conducted as follows: Cards containing 25 squares, set forth in five horizontal and five vertical rows, were distributed free of charge at the stations and at the sponsors' retail stores and at other sources. Each square contained the name of a song and players checked off the title as the studio orchestra played the tune. Prizes could be won in various ways. Among others, a player became entitled to a prize when he checked any one of the three specified horizontal rows on the card.

To win a prize, the contestant must have obtained a card with a winning row of song titles, listened to the program broadcast, filled in and checked the names of songs and musical selections played, and presented the winning card to any one of the sponsor's stores in the broadcast area.

When Station WMBD refused to perform its contract to broadcast Mu\$ico, Clef, Inc., the owner of the program instituted suit for specific performance. Peoria Broadcasting Co. defended on the ground that Mu\$ico constituted a lottery. The court ruled that Mu\$ico was not a lottery and did not violate any statutes or laws of the United States of America. It decreed specific performance of the contract. A copy of the complaint, the answer and motion to strike answer in the Clef case is annexed hereto as Exhibit B-1 and a copy of the decree therein is annexed hereto as
Exhibit B-2.

605 5. In 1939, the Solicitor of the Post Office Department issued two rulings with respect to whether Mu\$ico was a lottery. In the first ruling, dated July 1, 1939, the Solicitor advised the Postmaster at Monroe, Wisconsin, that Mu\$ico did not violate

the Federal lottery laws. In the second ruling, dated September 29, 1939, the Solicitor advised the Postmaster of Wyoming, Illinois, that Mušico did violate the Federal lottery laws.

Plaintiff's attorneys have been informed by the Solicitor of the Post Office Department in a letter dated May 3, 1949, that:

"It is likely that if the 'Mušico' plan were submitted to this office today, it would be held, in view of the change reflected in the enclosed notice, not to conflict with the postal lottery laws."

On information and belief: the "Mušico plan" referred to in the said letter of the Solicitor, dated May 3, 1949, was basically similar to the format of Mušico as described in paragraph 4 of this affidavit. However, the said "Mušico plan" did contain an additional feature in that cash prizes were awarded to the three persons who correctly checked off the songs played on any one of the first three rows on the Mušico card, and were first to telephone the radio station to give the correct answer with respect to the row so checked.

The notice which the Solicitor enclosed in his said letter of May 3, 1949 was as follows:

"Ruling of the Solicitor of the Post Office Department to Postmasters, February, 1947:

"**RULINGS ON LOTTERIES, GIFT ENTERPRIZES, ETC.**—All postmasters should carefully note the following with regard to the present policy of the Office of the Solicitor in making rulings on lotteries, gift enterprises, etc., under Section 601, P. L. & R. 1940.

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money 606 for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present." (P. O. Bulletin February 13, 1947.)

6. On the radio program "Truth and Consequences" a prize of \$10,000 was offered for the correct identification of a well-known person, referred to as "Mr. Heartbeat," described in the following riddle which was repeated in the course of each broadcast of the program:

"Sigh Sigh Pie
Half prince and pauper I.
I'm drab they say
But remember fair play.
Ring Ring Hi."

Additional clues to the identity of this person were broadcast on the program each week until identification was made. Listeners were requested during the course of broadcasts to send in postcards bearing their names, addresses and telephone numbers. Listeners were also urged to contribute to the Heart Association, but such a contribution was not a condition of participation in the contest. Each week during the contest three postcards were selected at random and telephone calls were made in the course of the broadcast to the persons named on the cards. If the person called answered the telephone, he was asked to identify "Mr. Heartbeat." No clues were given to him at the time of this telephone call. A correct identification entitled him to the \$10,000 prize; a consolation prize consisting of a set of sterling silver was awarded in case of an incorrect answer.

The Solicitor of the Post Office Department on March 2, 1950, ruled that matter relating to the "Mr. Heartbeat" contest was mailable insofar as the Postal lottery laws are concerned.

A copy of the letter to the Solicitor requesting the ruling with respect to the "Mr. Heartbeat" contest and a copy of
607 the Solicitor's ruling with regard thereto are hereto annexed as Exhibits C-1 and C-2 respectively.

7. (a) The Federal Communications Commission, by letter dated March 29, 1940, requested the Department of Justice of the United States to investigate and to take appropriate action with respect to Mu\$ico. Upon information and belief: the format of Mu\$ico as referred to the Department of Justice was virtually identical to the Mu\$ico Plan as described in paragraph 5 of this affidavit. The Department of Justice, by letter dated April 29, 1950, informed the Commission that no prosecutive action should be instituted with respect thereto. A copy of each of said letters is annexed hereto as Exhibits D-1 and D-2. A photostatic copy of a transcription of Mu\$ico as broadcast on February 16, 1940, is annexed hereto as Exhibit D-3. Said transcription is representative of Mu\$ico as referred to the Department of Justice by the Commission.

(b) At the same time as it made its request with respect to Mu\$ico, the Federal Communications Commission made similar requests with respect to four other programs, viz: "Songo," "Especially for You," "Sear's Grab Bag" and "Dixie Treasure Chest." Copies of the letters making said requests, together with enclosures, are annexed hereto as Exhibits E-1, E-2, E-3 and E-4.

The Federal Communications Commission in a press release dated March 29, 1940, described these four programs as follows:

"Songo (WIP) has similar characteristics (to Mu\$ico), employing cards furnished by the Nevins Drug Co., Philadelphia.

"In Especially For You (WFIL) a wheel is spun to determine from Philadelphia and suburban directories the person who is to be given a chance to win a Farnsworth radio. If the party selected has a telephone, he is called. If he answers the phone and answers two questions satisfactorily, he receives a radio. If he does not respond correctly, he is given two tickets to Mystery History, a network show.

608 "Sears Grab Bag (WISE) involves a box of numbered slips of paper placed in front of the Sears store in Asheville. The advertising manager of the store selects the numbers. If the holders of the numbers are in the broadcast audience, they receive prizes. If they are not listening in, the nearest numbers get the prizes.

"In the Dixie Treasure Chest (KRLD) program the announcer selects a number from the Dallas telephone directory. If the party called answers the telephone, he or she is asked 'What is the color of the border of the Dixie Margarine package?' If the party answers correctly, a prize of \$50 is the stake."

The Department of Justice by letters dated April 29, 1940, ruled that prospective action should not be instituted as to said four programs. A copy of each of said letters is annexed hereto as Exhibits E-5, E-6, E-7 and E-8.

8. The Federal Communications Commission in 1940 referred to the Department of Justice of the United States for possible prosecution under § 316 of the Communications Act, certain additional programs broadcast on various stations. The first such referral was by a letter from Chairman Fly of the Commission to the Attorney General dated February 19, 1940, transmitting documents relating to certain programs broadcast by Stations KWFT and KBST for Mead's Bakery and to a program known as "The Pot of Gold" broadcast over the Red network of NBC. Annexed hereto as Exhibit F-1 is a true copy of the letter of Chairman Fly dated February 19, 1940 and annexed hereto as Exhibits F-2, F-3 and F-4, respectively, are true copies of the documents enclosed with such letter, consisting of an affidavit of Joe B. Carrigan sworn to January 1, 1940, with certain documents attached; a letter from Joe A. Faucett to an inspector of the Federal Communications Commission dated December 11, 1939; and a transcript of one broadcast of the "Pot of Gold" program over Station WRC. Annexed hereto as Exhibit F-5 is a true copy of a press release of the Federal Communications Commission dated February 8, 1940 relating to this referral. Annexed hereto as Exhibit F-6 is a true copy of a letter from the Depart-

609 ment of Justice to Chairman Fly dated April 10, 1940 declining to institute prosecution under § 316 of the Communications Act with respect to the "Pot of Gold" and "Mead's Bakery" programs.

9. When the television show "Stop the Music" was instituted, it was desired to identify members of the public who had television sets and might be expected to view such programs; accordingly, members of the public were invited to send in postcards with their names and addresses to indicate that they were interested in becoming contestants. American Broadcasting Company, Inc. made application to the Solicitor of the Post Office Department for a ruling as to whether the proposed arrangements were in violation of the postal lottery statute, United States Code, Title 18, § 1302. A ruling was made by the Solicitor. Exhibit G-1 hereto annexed is a true copy of the letter requesting such ruling and Exhibit G-2 hereto annexed is a true copy of the Solicitor's reply containing such ruling.

10. Research has disclosed, and I therefore believe that, there have been no contrary court decisions since the foregoing rulings of the Post Office Department and of the Department of Justice.

11. No previous application has been made for the relief herein requested or any similar relief.

It is respectfully submitted that plaintiff's motion for summary judgment should be granted.

Max Freund.

MAX FREUND.

Sworn to before me this 22nd day of September 1952.

Julia D. Caputo,

JULIA D. CAPUTO,

Notary Public for the State of New York.

Qualified in New York County, No. 31-0559950.

Cert. filed with City Register, N. Y. County.

Commission expires March 30, 1953.

610 [Exhibit A omitted. Printed side page 44 ante.]

614 [Exhibit B-1 complaint omitted. Printed side page 29 ante.]

621

Exhibit B-1, to affidavit

In the Circuit Court of Peoria County

Equity

CLEF, INC., A CORPORATION, PLAINTIFF

v.

PEORIA BROADCASTING COMPANY, A CORPORATION, DEFENDANT

STATE OF ILLINOIS,

County of Peoria, ss:

ANSWER

Peoria Broadcasting Company, a Corporation, Defendant, by H. D. Morgan, its attorney, for answer to the Complaint of Clef, Inc., a Corporation, Plaintiff, says:

1. Defendant admits all of the allegations of the Complaint and that Plaintiff would be entitled to specific performance of its contract with Defendant for the furnishing of broadcasting facilities at the times and in the manner as set forth in the Complaint if the program referred to in such Complaint did not violate the sections of the Federal statutes hereinafter referred to.

2. For its defense to the Complaint and as its reason for refusing to perform its contract with Plaintiff for the furnishing of broadcasting facilities as set forth in the Complaint, Defendant states that said Mu\$ico program as specifically described in the said Complaint (in which form it is tendered for presentation to Defendant) violates the Federal statutes known and described as 47 U. S. Code 316, 18 U. S. Code 336 and 18 U. S. Code 387. Defendant further avers that 47 U. S. Code 316 provides:

"LOTTERIES AND OTHER SIMILAR DEVICES.—No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall upon conviction thereof, be fined not more than \$1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs."

Defendant further alleges that said Mu\$ico program as specifically described in the Complaint violates the statutory provision

of the Federal statute hereinabove set forth, and for such reason Defendant should not be required to perform its contract with Plaintiff in the presentation of said program.

3. Defendant further avers that it would be required in connection with the presentation of said Mu\$ico program as set forth in the Complaint to use the United States mails for the purpose of circulating cards or other material concerning said Mu\$ico program which would be in violation of the Federal statutes familiarly known and described as 18 U. S. Code 336 and 18 U. S. Code 387.

By reason of the matters and things set forth in this Answer, Defendant denies that it should be required to perform its contract with Plaintiff in violation of the Federal statutes herein referred to.

PEORIA BROADCASTING COMPANY,
By _____,

Its Attorney.

H. D. MORGAN,

Attorney-at-Law,

Central National Bank Bldg., Peoria, Ill.

623

In the Circuit Court of Peoria County

Equity

CLEF, INC., A CORPORATION, PLAINTIFF *v.* PEORIA BROADCASTING
COMPANY, A CORPORATION, DEFENDANT

STATE OF ILLINOIS,

County of Peoria, ss:

MOTION TO STRIKE ANSWER

Now comes Clef, Inc., a Corporation, Plaintiff, by Quinn, Quinn & O'Hern, its attorneys, and moves the Court to strike from the files in this cause the Answer of the Defendant, Peoria Broadcasting Company, herein filed and to enter judgment herein and grant the specific relief prayed in the Complaint of Plaintiff, and for reasons for said Motion shows to the Court the following:

1. That said Answer fails to set forth any facts constituting or fails to allege, any legal defense to Plaintiff's Complaint or any part thereof.

2. That, as shown by the Complaint and the detailed description of the Musico program therein contained, the said program does not violate any Federal statutes or any of the statutes set forth in the Answer of Defendant.

Wherefore, Plaintiff prays that said Answer be stricken from the files herein and that this Court enter a Decree granting to Plaintiff the relief prayed in the Complaint of specific performance of its contract with Defendant as therein set forth.

CLEF, INC.,

By _____,
Its Attorneys.

QUINN, QUINN & O'HERN,
Attorneys-at-Law,

1104 Lehmann Building, Peoria, Illinois.

624 [Exhibit B-2 omitted. Printed side page 37 ante.]

626 [Exhibits C-1 and C-2 omitted. Printed side page 39 ante.]

629 [Exhibits D-1 through E-1 omitted. Printed side page 83 ante.]

670 [Exhibit E-5 omitted. Printed side page 107 ante.]

671 [Exhibit E-6 omitted. Printed side page 82 ante.]

672 [Exhibit E-7 omitted. Printed side page 76 ante.]

673 [Exhibit E-8 omitted. Printed side page 70 ante.]

674 [Exhibits F-1 through F-4 omitted. Printed side page 48 ante.]

691 [Exhibit F-5 omitted. Printed side page 444 ante.]

692 [Exhibit F-6 omitted. Printed side page 62 ante.]

693 [Exhibit G-1 omitted. Printed side page 42 ante.]

694 [Exhibit G-2 omitted. Printed side page 43 ante.]

697 In United States District Court

Civil action No. 52-38

[Title omitted.]

Notice of motion

(Filed September 23, 1952)

SIRS. Please take notice that upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 11th day of August, 1952, and upon all the other

papers and proceedings heretofore filed and had herein, the undersigned will move the statutory three-judge District Court to be convened in the above-entitled action at such time and place as the Court may designate for an order dismissing the complaint or, in the alternative, directing that summary judgment be entered in favor of the United States of America and the Federal Communications Commission, defendants, on the grounds stated in the attached motions.

William J. Hickey,
 WILLIAM J. HICKEY,
Special Assistant to the Attorney General,
Attorney for the United States of America.
 Benedict P. Cottone,
 BENEDICT P. COTTONE,
General Counsel,
 Richard A. Solomon,
 RICHARD A. SOLOMON,
Assistant General Counsel.

Dated: Washington, D. C., September 22, 1952.

NEWELL A. CLAPP,
Acting Assistant Attorney General,
 JAMES E. KILDAY,
Special Assistant to the Attorney General,
 MYLES J. LANE,
United States Attorney for the Southern District of New York,
Attorneys for the United States of America.

698 Daniel R. Ohlbaum,
 DANIEL R. OHLBAUM,
Counsel,
Attorneys for the Federal Communications Commission.
 To ROSENMAN GOLDMARK COLIN & KAYE,
Attorneys for Plaintiff, 575 Madison Avenue, New York 22,
New York.
 Copy received September 22, 1952.
 ROSENMAN GOLDMARK
 COLIN & KAYE,
Attorneys for CBS.

In United States District Court

Civil Action No. 52-38

[Title omitted.]

[File endorsement omitted.]

*Motions to dismiss the complaint or, in the alternative, for
summary judgment*

(Filed September 23, 1952)

Upon the amended complaint herein and upon the annexed affidavit of Benedict P. Cottone, sworn to the 11th day of August 1952, and upon all other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court that the amended complaint be dismissed or, in the alternative, for summary judgment in their favor.

A. The ground of the Motion to Dismiss the complaint is: Plaintiff fails to state a claim upon which relief can be granted.

B. The ground of the Motion for Summary Judgment is: The amended complaint together with the exhibits thereto annexed, the affidavit submitted on this motion, and the other papers and proceedings heretofore filed and had herein, show that there is no genuine issue as to any material fact and that defendants United States of America and the Federal Communications Commission are entitled to a judgment as a matter of law.

Dated: Washington, D. C., Sept. 22, 1952.

William J. Hickey,

WILLIAM J. HICKEY,

*Special Assistant to the Attorney General,
Attorney for the United States of America.*

Benedict P. Cottone,

BENEDICT P. COTTONE,

General Counsel,

Richard A. Solomon,

RICHARD A. SOLOMON,

Assistant General Counsel,

Daniel R. Ohlbaum,

DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

NEWELL A. CLAPP,

Acting Assistant Attorney General,

700

JAMES E. KILDAY,

Special Assistant to the Attorney General,

MYLES J. LANE,

*United States Attorney for the Southern District of New
York.*

Attorneys for the United States of America.

701

Affidavit of Benedict P. Cottone

DISTRICT OF COLUMBIA,
City of Washington, ss:

Benedict P. Cottone, being duly sworn, deposes and says:

1. He is the General Counsel of the Federal Communications Commission, and makes this affidavit in support of the Motion for Summary Judgment made by the United States of America and the Federal Communications Commission, defendants, and in opposition to the Motion for Summary Judgment made by the plaintiff.

2. He is familiar with the Commission's proceedings with respect to the promulgation of rules governing the broadcast of lottery information, and that the proceedings included the following:

(a) These proceedings concerning the promulgation of rules governing the broadcast of lottery information were instituted by the Commission's Notice of Proposed Rule Making, released August 5, 1948. Proposed rules interpreting Section 316 of the Communications Act of 1934, as amended, 47 U. S. C. Section 326, were appended to that Notice. The section referred to prohibited the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance."

(b) In the light of the prior removal of Section 316 from the Communications Act of 1934, as amended, and recodification of this section as Section 1304 of the United States Criminal Code, 18 U. S. C. Section 1304, the Commission issued, on August 27, 1948, a Supplemental Notice of Proposed Rule Making.

702 (c) Pursuant to the above Notices, briefs and comments were filed with the Commission by the Radio Council of National Advertisers, Inc.; Premium Advertising Associates of America, Inc.; Radio Features, Inc.; Louis G. Cowan, Inc.; Maryland Broadcasting Company, Licensee of Station WITH; American Broadcasting Company, Inc.; National Broadcasting Company, Inc.; National Association of Broadcasters; Pierson and Ball; Arthur W. Scharfeld; and Columbia Broadcasting System, Inc., plaintiff in this action.

(d) On October 19, 1948, oral argument was held before the Commission en banc, in which National Association of Broadcasters; Maryland Broadcasting Company; Radio Features, Inc.; Radio Council of National Advertisers; American Broadcasting Company, Inc.; National Broadcasting Company, Inc.; W. Theodore Pierson; Arthur W. Scharfeld; Simons Broadcasting Company; Louis G. Cowan, Inc.; and Columbia Broadcasting System, Inc., plaintiff in this action, participated.

(e) After consideration of the briefs and comments filed, and of the oral arguments, the Commission released, on August 19, 1949, its Report and Order promulgating Sections 3.192, 3.292, and 3.692 of its Rules and Regulations, to enjoin the enforcement of which this action is brought. The Report and Order specified that these rules were to become effective on October 1, 1949. Commissioners Coy, Chairman, Hyde, and Jones did not participate in the adoption of the Report and Order of August 19, 1949, and Commissioner Hennock dissented from its adoption. By its Sixth Report and Order adopted on April 11, 1952 in Dockets No. 8736, et al., the Commission renumbered Section 3.692 as Section 3.656.

(f) The rules appended to the Report and Order of August 19, 1949, provide that no authorization for the operation of a broadcast station will be granted if the applicant proposes to follow or continue to follow a policy of broadcasting or permitting the broadcasting of any program violative of Section 1304 of 703 the United States Criminal Code. The rules further set forth with specificity certain types of programs which the Commission will in any event consider as falling within the provisions of that statute.

(g) This action and a similar action brought in the District Court for the Northern District of Illinois having been commenced, a temporary restraining order suspending the effectiveness of the rules here in issue with respect to the parties in litigation having been issued by the District Court for the Northern District of Illinois on September 13, 1949, and this Court having decided on September 19, 1949 to issue a similar order, the Commission, on September 21, 1949, issued an order postponing the effective date of said rules until at least thirty days after the ultimate determination of these actions.

3. A certified copy of the proceedings before the Commission in Docket 9113 (In re Promulgation of Rules Governing Broadcast of Lottery Information) is filed herewith and incorporated herein by reference as Exhibit A.

4. Plaintiff broadcasts one or more programs which contain features comprehended by one or more of the rules in issue in this case. After such rules become effective, the failure of plaintiff to discontinue the broadcasting of any or all of such programs would result in setting for hearing applications for renewal of licenses filed by plaintiff and, upon a finding that such programs have been or will continue to be carried, such applications would be denied in accordance with the policy set out in the rules in issue.

5. Attached hereto as Exhibits B and C are true photostatic copies of letters to the Commission dated, respectively, April 4, 1940, and April 11, 1940, and enclosures, received from radio station WGN, Inc. with respect to changes in the format of the radio program called "Musico" which were made prior to April 29, 1940.

704 6. Affiant submits in response to the contentions of the plaintiff, that:

(a) The Order and the Rules in issue are a proper application of the public policy announced by the Congress of the United States which the Commission must consider in fulfilling its duties under the Communications Act of 1934, as amended, and since denial of a license on the ground that the public interest would not be served by a grant is authorized by Sections 307, 308, 309, and 312 of the Communications Act, the promulgation and enforcement of the Order and Rules in issue are not in contravention of Section 9 (a) of the Administrative Procedure Act;

(b) The Commission in determining the qualifications of an applicant to hold a broadcast authorization may consider the doing of acts which constitute a violation of a criminal statute of the United States which expresses public policy in the broadcasting field as a ground for determining whether the public interest would be served by the grant of a license;

(c) The Order and the Rules in issue are a proper and reasonable exercise of the Commission's functions under the Communications Act of 1934, as amended;

(d) The Order and Rules are, as a matter of law, a correct interpretation of Section 1304 of the United States Criminal Code;

(e) The Order and the Rules do not violate Section 326 of the Communications Act of 1934, as amended;

(f) The Order and the Rules were issued in accordance with the Commission's Notice of August 27, 1948, after consideration of filed comments and briefs and an oral argument in which all interested parties participated, and were duly published in the Federal Register (14 F. R. 5429, September 1, 1949); accordingly the Order and the Rules in issue were promulgated in accordance with the provisions of Section 4 (a) and (b) of the Administrative Procedure Act;

705 (g) The Order and the Rules are not inconsistent with the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act; and

(h) The Order and the Rules do not violate any of the provisions of the Constitution of the United States or of the Amendments thereto.

7. Affiant submits that Exhibits A, B, and C are relevant to the above issues sought to be raised and that they show that the Order in issue is within the Commission's authority conferred by the Communications Act of 1934, as amended; that it is in accordance with the Commission's Notice of August 27, 1948, pursuant to which an oral argument on which the Order is based was held; that it is proper and reasonable and in the public interest, convenience and necessity; that it is not violative of any of the provisions of the Constitution of the United States; and that there is no genuine issue as to any material fact.

Benedict P. Cottone.

BENEDICT P. COTTONE.

Subscribed and sworn to before me this 11th day of August 1952.

[SEAL]

FOREST L. MCCLENNING,

Notary Public.

My commission expires January 15, 1953.

706 In United States District Court, Southern District
of New York

Civil Action No. 52-38

[File endorsement omitted.]

COLUMBIA BROADCASTING SYSTEM, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS
COMMISSION, DEFENDANTS

Final judgment

(Filed March 11, 1953)

This cause having come on to be heard on plaintiff's motion for summary judgment and on defendants' motion for an order dismissing the amended complaint or, in the alternative, for summary judgment, and the parties having stipulated the facts for the purposes of this action, and the Court having heard the arguments of counsel, and upon consideration thereof and of the briefs and documents filed by the parties, and the majority of the Court having rendered and filed an opinion on February 5, 1953 stating that it was unnecessary to make findings of fact in view of the facts having been stipulated by the parties and setting forth its conclusions of law and the relief to be granted, and a dissenting opinion having been filed on said date, it is hereby

Ordered, adjudged and decreed that plaintiff's motion for summary judgment is granted to the extent that defendants are permanently restrained and enjoined from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of defendant Federal Communications Commission's Rules adopted August 18, 1949, and that the Order of said defendant Federal Communications Commission dated August 18, 1949 adopting said subdivisions (2), (3) and (4) of paragraph (b) of said Sections 3.192, 3.292 and 3.656 of said Rules is to that extent vacated and set aside; and it is hereby further

Ordered, adjudged and decreed that plaintiff's motion for summary judgment and an injunction is denied with respect to paragraph (a) and paragraph (b) (1) of said Sections 3.192, 3.292 and 3.656 of said Rules; and that the said Order of said defendant Federal Communications Commission adopting the Rules is sustained with respect to said paragraphs (a) and (b) (1); and it is further

Ordered, adjudged and decreed that defendants' motion to dismiss the amended complaint is denied; and it is hereby further

Ordered, adjudged and decreed that defendants' motion for summary judgment is granted only with respect to paragraphs (a) and (b) (1) of Sections 3.192, 3.292 and 3.656 of said Rules and is in all other respects denied.

Dated: New York, March 10th, 1953.

VINCENT L. LEIBELL,
District Judge.
EDWARD WEINFELD,
District Judge.

Dissenting:

CHARLES E. CLARK,
Judge Court of Appeals.

Judgment entered: Mar. 11, 1953.

WILLIAM V. CONNELL,
Clerk.

708 The foregoing judgment is hereby consented to as to form and plaintiff may submit same for signature and entry without further notice to defendants.

Dated: New York, February 19, 1953.

MYLES J. LANE,
*United States Attorney for the
Southern District of New York,
Attorney for the Defendants.*

712 In United States District Court

Civil action No. 52-38

[Title omitted.]

(Order allowing appeal—filed May 8, 1953)

The Federal Communications Commission, defendant herein, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the order of this Court in this cause entered on March 11, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendant's motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendant's favor, and permanently restrained the Federal Communications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.191, 3.291 and 3.656 of its Rules and Regulations adopted August 18, 1949, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same hereby is allowed as prayed for and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court.

It is further ordered that citation shall issue in accordance with law.

CHARLES E. CLARK,
*Judge of the United States Court of Appeals
for the Second Circuit.*

VINCENT L. LEIBELL,
Judge of the United States District Court.

EDWARD WEINFELD,
Judge of the United States District Court.

Dated: May 8th, 1953.

715

In United States District Court

Civil Action No. 52-38

[Title omitted.]

Assignment of errors and prayer for reversal

(Filed May 8, 1953)

The Federal Communications Commission, defendant in the above entitled cause, in connection with its appeal to the Supreme Court, does hereby file the following assignment of errors upon which it will rely in its prosecution of said appeal from the order of the statutory three-judge United States District Court for the Southern District of New York, entered on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Communications Commission for enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949.

Said Court erred:

1. In holding that subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Rules and Regulations of the Federal Communications Commission adopted in its Report and Order of August 18, 1949 go beyond, and constitute an incorrect interpretation of, Section 1304, Title 18, United States Code and are an unlawful exercise of the rule making power.

2. In granting plaintiff's motion for summary judgment in part by permanently enjoining the Federal Communications Commission from enforcing said subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations and, to that extent, vacating and setting aside the Commission's order adopting said Rules.

716 3. In denying defendants' motion to dismiss the amended complaint or, in the alternative, for summary judgment in favor of defendants, to the extent that the Court did so in denying the motion to dismiss the amended complaint and in granting defendants' motion for summary judgment in defendants' favor only in respect to paragraphs (a) and (b) (1) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations.

Wherefore, defendant Federal Communications Commission prays that the order entered herein on the 11th day of March, 1953, insofar as said order entered summary judgment in plaintiff's favor and denied defendants' motion to dismiss the amended complaint herein or, in the alternative, for summary judgment in defendants' favor, and permanently restrained the Federal Com-

munications Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of its Rules and Regulations adopted August 18, 1949, be reversed, and that such other and further relief be granted as to the Court may seem just and proper.

Dated May 8, 1953.

Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel.
J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel.
Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel.

Attorneys for the Federal Communications Commission.

718

In United States District Court

Civil Action No. 52-38

[Title Omitted.]

[File endorsement omitted.]

Order permitting transmission of original documents

(Filed May 25, 1953)

In accordance with the provisions of the praecipe herein, and pursuant to the motion to transmit certain original documents on the appeal of the above-entitled cause to the Supreme Court of the United States, and upon the annexed consent by the attorneys for the plaintiff, it is

Ordered, that the original of all documents, transcripts, exhibits or other parts of this Court's records in the above-entitled cause, of which there are no copies on file, may all be forwarded in lieu of copies of such documents to the Clerk of the Supreme Court of the United States as part of the transcript of the record on the appeal herein.

CHARLES E. CLARK,
*Judge of the United States Court of
Appeals for the Second Circuit.*
VINCENT L. LEIBELL,
*Judge of the United
States District Court.*
EDWARD WEINFELD,
*Judge of the United
States District Court.*

Dated: May 21st, 1953.

724

In United States District Court

Civil Action No. 52-38

[Title omitted.]

[File endorsement omitted.]

Praecipe

(Filed May 8, 1953)

To the Clerk of the United States District Court for the Southern District of New York:

You will please prepare a transcript of the Record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court, and include in said transcript the following:

1. Complaint and exhibits thereto, filed by Columbia Broadcasting System, Inc. on September 2, 1949.

2. Affidavit of Joseph H. Ream, sworn to September 14, 1949, and exhibits thereto.

3. Stipulation permitting entry of temporary restraining order, dated September 21, 1949.

4. Temporary restraining order, entered September 23, 1949.

5. Notice of Clerk of Court advising that motion for interlocutory injunction was designated for hearing on October 27, 1949, dated October 17, 1949.

6. Stipulation postponing date of hearing of motion for interlocutory injunction, dated October 17, 1949, and filed October 24, 1949.

7. Answer of the United States of America and Federal Communications Commission, filed October —, 1949.

8. Stipulation for filing of amended complaint, together with amended complaint and exhibits thereto, filed September 22, 1952.

9. Notice of motion for summary judgment in favor of Columbia Broadcasting System, Inc., with supporting affidavit of Max Freund and exhibits thereto, filed September 22, 1952.

725 10. Notice of motion and motion to dismiss complaint, or for summary judgment in favor of United States of America and Federal Communications Commission, together with supporting affidavit of Benedict P. Cottone and exhibits thereto, filed September 22, 1952.

11. Order convening three-judge court, entered October 30, 1952.

12. Briefs submitted to the District Court on behalf of Columbia Broadcasting System, Inc., and defendants United States of America and Federal Communications Commission.

13. Opinions of District Court, dated February 5, 1953.

14. Final Judgment of District Court, entered March 11, 1953.

15. Petition for appeal.

16. Assignment of errors and prayer for reversal.

17. Statement as to jurisdiction.

18. Order allowing appeal.

19. Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States.

20. Order permitting transmission of original documents.

21. Citation on appeal.

22. Admission of service of papers on appeal.

23. The praecipe with acknowledgement of service and waiver.

24. Clerk's certificate.

Said transcript is to be prepared as required by law and the Rules of this Court and Rules of the Supreme Court of the United States, and is to be filed in the Office of the Clerk of the Supreme Court.

Dated: May 8, 1953.

Benedict P. Cottone,

BENEDICT P. COTTONE,

General Counsel,

J. Roger Wollenberg,

J. ROGER WOLLENBERG,

Assistant General Counsel,

Daniel R. Ohlbaum,

DANIEL R. OHLBAUM,

Counsel,

Attorneys for the Federal Communications Commission.

728

In the Supreme Court of the United States

October Term, 1952

No. 859

FEDERAL COMMUNICATION COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 860

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 861

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

Statement of points to be relied upon

(Filed June 27, 1953)

Appellant adopts for its statement of points upon which it intends to rely in its appeals to this Court the points contained in its Assignments of Errors heretofore filed.

Respectfully submitted.

R. A. Solomon,
RICHARD A. SOLOMON,
Acting General Counsel,
J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,
Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,
Counsel for Appellant,
Federal Communications Commission.

304 FCC VS. AMERICAN BROADCASTING CO., INC., ET AL.

729 [Acknowledgments of service omitted in printing.]

733 [File Endorsement omitted.]

734 In the Supreme Court of the United States

October Term, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

Stipulation designating parts of the record to be printed

(Filed July 21, 1953)

The parties to the above-entitled actions hereby stipulate as follows:

I. That the records in the above-entitled actions, which are companion actions concerning the same subject matter, be printed together as one record, with no duplication of identical documents.

II. That the following parts of the records in each of the actions should be printed by the Clerk of the Supreme Court:

A. With respect to Federal Communications Commission v. American Broadcasting Company, Inc., No. 117, the following:

1. Stipulation for filing of amended complaint, together with amended complaint and exhibits thereto, filed September 22, 1952. (Praecipe, Item 11.)

735 2. Letter to Judge Vincent L. Leibell from Alfred McCormack, dated October 14, 1952. (Praeipe, Item 12.)

3. Affidavit of G. B. Zorbaugh, sworn to September 19, 1952, and exhibits thereto. (Praeipe, Item 13.)

4. Notice of Motion for summary judgment on behalf of American Broadcasting Company, Inc., dated September 22, 1952. (Praeipe, Item 14.)

5. Notice of Motion and motion to dismiss complaint, or for summary judgment in favor of United States of America and Federal Communications Commission, together with supporting affidavit of Benedict P. Cottone and exhibits thereto, filed September 22, 1952, except certified copy of proceeding before the Federal Communications Commission in Docket 9113 (In Re Promulgation of Rules Governing Broadcast of Lottery Information), which is Exhibit A to affidavit of Benedict P. Cottone. (Praeipe, Item 15.)

6. Opinions of District Court, dated February 5, 1953. (Praeipe, Item 19.)

7. Final Judgment of District Court, entered March 11, 1953. (Praeipe, Item 20.)

8. Assignment of errors and prayer for reversal. (Praeipe, Item 22.)

9. Order allowing appeal. (Praeipe, Item 24.)

10. Order permitting transmission of original documents. (Praeipe, Item 26.)

11. The praeipe with acknowledgment of service and waiver. (Praeipe, Item 29.)

12. Clerk's certificate. (Praeipe, Item 30.)

B. With respect to Federal Communications Commission v. National Broadcasting Company, Inc., No. 118, the following:

1. Stipulation for filing of amended complaint dated September 16, 1952, and amended complaint of National Broadcasting Company, Inc., together with exhibits thereto, filed September 22, 1952. (Praeipe, Item 8.)

736 2. Notice of motion for summary judgment on behalf of National Broadcasting Company, Inc., together with affidavit of Gustav B. Margraf, sworn to September 18, 1952, and exhibits thereto, filed September 22, 1952. (Praeipe, Item 9.)

3. Notice of motion and motion to strike paragraphs 13, 14, and 16 of amended complaint, and to dismiss complaint, or for summary judgment on behalf of United States of America and the

Federal Communications Commission, together with affidavit of Benedict P. Cottone, sworn to August 1, 1952, and exhibits thereto, filed September 22, 1952, except certified copy of proceeding before the Federal Communications Commission in Docket 9113 (In Re Promulgation of Rules Governing Broadcast of Lottery Information), which is Exhibit A to affidavit of Benedict P. Cottone. (Praeipce, Item 10.)

4. Opinions of the district court, dated February 5, 1953. (Praeipce, Item 13.)

5. Final judgment of the district court, entered March 11, 1953. (Praeipce, Item 14.)

6. Assignment of errors and prayer for reversal. (Praeipce, Item 16.)

7. Order allowing appeal. (Praeipce, Item 18.)

8. Order permitting transmission of original documents. (Praeipce, Item 20.)

9. The praecipe with acknowledgment of service and waiver. (Praeipce, Item 23.)

10. Clerk's certificate. (Praeipce, Item 24.)

C. With respect to Federal Communications Commission v. Columbia Broadcasting System, Inc., No. 119, the following:

1. Stipulation for filing of amended complaint, together with amended complaint and exhibits thereto, filed September 22, 1952. (Praeipce, Item 8.)

737 2. Notice of motion for summary judgment in favor of Columbia Broadcasting System, Inc., with supporting affidavit of Max Freund and exhibits thereto, filed September 22, 1952. (Praeipce, Item 9.)

3. Notice of motion and motion to dismiss complaint, or for summary judgment in favor of United States of America and Federal Communications Commission, together with supporting affidavit of Benedict P. Cottone and exhibits thereto, filed September 22, 1952, except certified copy of proceeding before the Federal Communications Commission in Docket 9113 (In Re Promulgation of Rules Governing Broadcast of Lottery Information), which is Exhibit A to affidavit of Benedict P. Cottone. (Praeipce, Item 10.)

4. Opinions of district court, dated February 5, 1953. (Praeipce, Item 13.)

5. Final judgment of district court, entered March 11, 1953. (Praeipce, Item 14.)

6. Assignment of errors and prayer for reversal. (Praeipce, Item 16.)

7. Order allowing appeal. (Praeipe, Item 18.)
8. Order permitting transmission of original documents. (Praeipe, Item 20.)
9. The praeipe with acknowledgment of service and waiver. (Praeipe, Item 23.)
10. Clerk's certificate. (Praeipe, Item 24.)

III. That those parts of the record which are not printed may be referred to by any of the parties in their briefs as though they had been printed.

738 Respectfully submitted.

J. ROGER WOLLENBERG,
Counsel for Appellant,
Federal Communications Commission
 CRAVATH, SWAINE & MOORE,
 ALFRED McCORMACK,
Counsel for Appellee,
American Broadcasting Company, Inc.
 CAHILL, GORDON, ZACHRY
 & REINDEL,
Counsel for Appellee,
National Broadcasting Company, Inc.
 ROSENMAN, GOLDMARK, COLIN
 & KAYE,
Counsel for Appellee,
Columbia Broadcasting System, Inc.

Dated: July 9, 1953.

741 Supreme Court of the United States

Nos. 117, 118, and 119, October Term, 1953

[Title omitted.]

Order noting probable jurisdiction

October 12, 1953

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated for argument and one hour is allowed to each side.

The Chief Justice took no part in the consideration or decision of this question.

**In the United States District Court for the
Southern District of New York**

Civil Action No. 52-24

AMERICAN BROADCASTING COMPANY, INC.,
PLAINTIFF-APPELLEE

against

UNITED STATES OF AMERICA, DEFENDANT, FED-
ERAL COMMUNICATIONS COMMISSION, DEFENDANT-
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, the Federal Communications Commission respectfully submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on March 11, 1953.

OPINIONS BELOW

The Report and Order of the Federal Communications Commission is not yet officially reported. It may be found in Vol. I, Part 3, Pike

(1)

& Fischer R. R. 91:231. The majority and dissenting opinions of the United States District Court for the Southern District of New York are not yet reported. Copies of these documents are attached hereto.

JURISDICTION

The judgment of the specially constituted, three-judge district court, sustaining in part and setting aside in part the rules adopted by the Federal Communications Commission, was entered on March 11, 1953. A petition for appeal is presented herewith on May 8, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal; *National Broadcasting Company, Inc. v. United States*, 319 U. S. 190; *Radio Corporation of America v. United States*, 341 U. S. 412.

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which prohibits

the broadcast of lotteries. The question presented on this appeal is:

1. Whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTES INVOLVED

18 U. S. C. 1304 and pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*, are set forth in the Appendix hereto.

STATEMENT

The plaintiff-appellee, American Broadcasting Company, Inc., is the licensee of radio and television broadcast stations subject to regulation by the Federal Communications Commission. On August 18, 1949, the Commission adopted a Report and Order, released August 19, 1949, adopting new Sections 3.192, 3.292, and 3.656¹ of its Rules and Regulations (14 F. R. 5432). These rules, which are identical, apply to commercial standard broadcast (AM), FM broadcast, and television broadcast stations, respectively. They were adopted after rule-making proceedings con-

¹ Section 3.656 was originally Section 3.692. It was renumbered by the Commission's Sixth Report and Order in Docket No. 8736, *et al.*, adopted April 11, 1952 (17 F. R. 3905).

ducted in conformity to the provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), including notices of proposed rule making, the submission and consideration of briefs and written comments by a number of parties of which appellee was one, and oral argument before the Commission *en banc*, in which appellee also participated.

In its Report and Order adopting the foregoing rules, the Commission recognized that Section 1304 of the Criminal Code, which prohibits the broadcast of lotteries and similar schemes, is a declaration by Congress directly applicable to exercise of the Commission's power and duty to grant broadcasting licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcasting licenses. The rules provide:

Lotteries and Give-Away Programs.—

(a) an application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or

similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304.)

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished, or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in

question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellee brought the present action in the United States District Court for the Southern District of New York, under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321-5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009,² seeking a permanent injunction against enforcement of

² Public Law 901, 81st Cong., 2d Session, 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under Section 402 (a) of the Communications Act to provide for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present one, which were commenced prior to its enactment. Section 14.

the rules. The district court granted a temporary restraining order, after which the Commission issued an order suspending the effective date of the rules pending a final determination of the action. The action was heard by the district court (the argument being consolidated with the argument in two companion actions brought by National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc.) on cross motions for summary judgment. The district court handed down its decision on February 5, 1953, sustaining the Commission's authority to adopt the rules and the interpretation of 18 U. S. C. 1304 contained in the rules, with the exception of subdivisions (2), (3), and (4) of paragraph (b) of the rules. These subsections delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize. The majority of the district court held, Circuit Judge Clark dissenting, that 18 U. S. C. 1304, which the rules interpret, requires the payment of a price or thing of value as the consideration element of a lottery.

Judge Clark, dissenting, ascribed the majority's view to * * * the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor," but

“It is the value to the participant of what he gives that must be weighed.” Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor’s altruism, yet the participant’s expenditure of any pecuniary amount—even “a cent,” see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recog-

nized in the well reasoned cases, such as *State v. Wilson*, 109 St. 349, 196 A. 757, cited below.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves the validity of rules of the Federal Communications Commission with respect to the licensing of commercial television and radio stations which have a significant impact upon the regulations and conduct of all such stations in the United States. Moreover, the rules rest upon an interpretation of a Federal criminal statute upon which the district court divided, and which should receive the definitive consideration of the Supreme Court.

As the record of this case shows, the so-called give-away programs, which offer prizes to members of the home audience as a means of inducing attention to radio and television advertising, have had recurrent periods of great popularity running back at least as far as 1940. During this period they have also been a matter of concern to the Federal Communications Commission, particularly in view of Section 1304 of Title 18, United States Code (formerly Section 316 of the Communications Act), which specifically makes the broadcast of a lottery a criminal offense. In view of the importance of the problem to administration of the Communications Act and the uncertainty in which licensees found themselves due to the lack of decisive Federal precedents and

extreme confusion among state courts in interpreting state antilottery statutes, the Commission undertook rule-making proceedings in aid of its licensing functions in order to clarify the responsibilities of broadcast licensees in this field in advance of individual licensing proceedings. The rules here at issue are the outcome of these proceedings.

The Supreme Court ruled upon the substance of the Federal antilottery statutes in the leading case of *Horner v. United States*, 147 U. S. 449. In that case a scheme under which the Austrian Government sold bonds, each bond being accompanied by a ticket entitling the holder to a chance in a drawing for the distribution of large sums of money, was found to be an illegal lottery.³ Since that time the various state antilottery statutes and the Federal laws have been interpreted in a great number of decisions bearing on the problem involved in this appeal of what constitutes sufficient consideration to make a scheme a lottery. The result of these divers decisions under divers statutes is considerable confusion; collection of the cases becomes a "barren task," as Judge Clark stated in his dissent in the court below. The decided cases may be generally catalogued as those requiring a valuable consideration paid directly for the chance

³ In *Federal Trade Commission v. Keppel*, 291 U. S. 304, the use of a lottery device in selling a product has been condemned as unfair competition.

to win a prize (see, e. g., *Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Ct. of Civ. App., Texas)) and those recognizing that a substantial benefit to the promoter which flows from the participants, and is necessary in order to have an opportunity to win, is sufficient to stamp the scheme a lottery (see, e. g., *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A. 2d 257; *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581 (C. C. E. D. N. Y.); *Affiliated Enterprises, Inc., v. Gantz*, 86 F. 2d 597, 599 (C. A. 10)).

Judge Clark in the court below concisely put the purpose of 18 U. S. C. 1304 when he said,

Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner v. United States*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.

The programs covered by the rules at issue are lotteries by every realistic standard. "Give-

away'' programs are obviously not eleemosynary affairs, but are founded upon expected return in profits to the sponsor and increased sales of radio time on the part of the station. The requirement of a prepaid monetary consideration as an essential element of a lottery, a requirement not in terms found in 18 U. S. C. 1304, is an unrealistic test. The radio stations involved and the promoters of give-away schemes receive tangible benefits from the increased audience lured by hope of winning a prize by chance.

It is submitted that the court below erroneously construed Section 1304, Title 18, U. S. C., and that its decision presents a substantial question of general importance in the regulation of radio and television stations by the Federal Communications Commission.

Respectfully submitted.

✓ Benedict P. Cottone,
BENEDICT P. COTTONE,
General Counsel,

✓ J. Roger Wollenberg,
J. ROGER WOLLENBERG,
Assistant General Counsel,

✓ Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
Counsel,

Federal Communications Commission.

Dated May 8, 1953.

APPENDIX A

Communications Act of 1934, as amended, 47
U. S. C. Sec. 151, *et seq.*

SEC. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national

emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the

day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SEC. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus

to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

Section 1304 of Title 18, United States Code.

§ 1304. Broadcasting Lottery Information. Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than \$1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

APPENDIX B

In the United States District Court for the
Southern District of New York

Civil 52-24

AMERICAN BROADCASTING COMPANY, INC.,
PLAINTIFF

against

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Civil 52-37

NATIONAL BROADCASTING COMPANY, INC.,
PLAINTIFF

against

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Civil 52-38

COLUMBIA BROADCASTING SYSTEM, INC., PLAINTIFF

against

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Before Charles E. Clark, Circuit Judge, Vin-
cent L. Leibell, District Judge, Edward Weinfeld,
District Judge.

G. B. Zorbaugh, Esq., 30 Rockefeller Plaza,
New York 20, N. Y.; Cravath, Swaine & Moore,
Esqs., 15 Broad Street, New York 5, N. Y.

Attorneys for American Broadcasting Company, Inc.: (Alfred McCormack, George B. Turner, Charles Myneder, Of Counsel). Cahill, Gordon, Zachry & Reindel, Esqs., 63 Wall Street, New York 5, N. Y.

Attorneys for National Broadcasting Company, Inc.: (Paul W. Williams, Gustav B. Margraf, Thomas E. Ervin, Dudley B. Tenney, Of Counsel). Rosenman, Goldmark, Colin & Kaye, Esqs., 575 Madison Avenue, New York 22, N. Y.

Attorneys for Columbia Broadcasting System, Inc.: (Ralph F. Colin, Max Freund, Andrew J. Schoen, Of Counsel).

James E. Kilday, William J. Hickey, Special Assistants to the Attorney General, Attorneys for the United States.

Benedict P. Cottone, General Counsel; J. Roger Wollenberg, Assistant General Counsel; Daniel R. Ohlbaum, Erich Saxl, Richard T. Conway, Counsel, Attorneys for the Federal Communications Commission.

Newell A. Clapp, Acting Assistant Attorney General; Myles J. Lane, United States Attorney for the Southern District of New York; Nathan Skolnik, Assistant United States Attorney, Attorneys for the United States.

LEIBELL, *D. J.*

These three actions were instituted in August 1949, to enjoin and set aside an order of the Federal Communications Commission adopting certain interpretative rules of the Commission in relation to "give-away" programs on radio

and television.¹ Jurisdiction of this three-judge court is based on the provisions of the Federal Communications Act [47 U. S. C. § 402 (a)] and the United States Judiciary and Judicial Procedure Act [T. 28 U. S. C. §§ 1336, 1398 and 2284]. The right to a judicial review of the action of the Federal Communications Commission is also asserted by the plaintiffs under Section 10 of the Administrative Procedure Act [5 U. S. C. § 1009].

The report of the Commission (released August 19, 1949) is entitled "In the Matter of Promulgation of Rules Governing Broadcast of Lottery Information" and states in its opening paragraphs that—

The Commission has this day determined to adopt the attached interpretative rules, set forth in the appendix to this Report, to be designated as Sections 3.192, 3.292, and 3.692. These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest. A Notice of Proposed Rule Making concerning this subject

¹ A similar action was brought in the District Court for the Northern District of Illinois and a temporary restraining order issued on September 13, 1949.

was issued by the Commission on August 5, 1948, and a Supplemental Notice of Proposed Rule Making was issued on August 27, 1948. Interested parties were afforded an opportunity to file briefs or statements setting forth why they believed the rules should or should not be adopted and oral argument on the matter was held before the Commission *en banc* on October 19, 1948.

The subsequent legal proceedings are summarized in the brief of defendants' counsel, in the American Broadcasting case, as follows:

The Commission's order provided that it would go into effect on October 1, 1949. On August 31, 1949, plaintiff filed its complaint in this action. On September 19, 1949, Judge Rifkind convened a statutory court consisting of Judge Clark, Judge Leibell, and himself, and on September 23, 1949, having heard a motion by plaintiff for a temporary restraining order Judge Rifkind issued a restraining order and set down the application for an interlocutory injunction for hearing before the three-judge court at a later date. That application, however, did not come on for hearing because, following Judge Rifkind's issuance of a temporary restraining order, the Commission on its own motion postponed the effective date of its proposed rules until 30 days after final decision in this and the co-pending actions.

Following a number of discussions between counsel for the Commission and counsel for plaintiffs in the several actions, it was agreed that the cases could be and should be presented to the Court in a form not requiring a decision on questions of

fact. For that purpose, amended complaints were prepared in the several actions and the amended complaint in the present action was filed on September 22, 1952. On the same day plaintiff moved on the complaint, a supporting affidavit and a stipulation with defendants' counsel, for summary judgment, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment.

The stipulation in each action provided that all the allegations of the amended complaint be taken as admitted by the defendants and that either plaintiff or defendants may rely upon facts set forth in the amended complaint in the companion actions and upon any of the affidavits filed in either of said companion actions by either plaintiff or defendants therein.

The three-judge court was thereafter reconstituted by the designation of Judge Weinfeld in place of Judge Rifkind, who had resigned as a District Judge. The motions in the three actions were consolidated for argument and were argued on December 15, 1952.

THE PLEADINGS AND MOTIONS

The amended complaint of the *American Broadcasting Company* alleges jurisdictional facts and specifies the statutes under which the action is brought; it recites the adoption of the Rules by the Commission, the institution of the action, the parties thereto, the plaintiff's extensive broadcasting and television business, and its large investment in broadcasting facilities for radio and

television programs. Paragraphs 11 and 12 of American's amended complaint alleges—

11. Plaintiff has expended substantial sums of money in building up among the public, advertisers, and broadcasting stations a valuable reputation and good will for the broadcasting stations it owns and operates and for the programs broadcast by its stations and furnished to affiliated stations for broadcasting by them. From time to time, plaintiff broadcasts programs having as the central feature the conduct of a contest in which prizes are awarded to the successful contestants. Such programs, or some of them, are within the terms of the Rules defining the types of programs which the Commission "will in any event consider" as violations of Section 1304 of the Criminal Code, although none of such programs constitutes, or has been held by any court to constitute, a lottery, gift enterprise, or similar scheme in violation of said Section. Such programs have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public. Many persons listen to, view and enjoy such programs although for one reason or another they are not eligible to win a prize. Such programs are highly popular, have contributed substantially to the reputation of and good will of plaintiff's stations and those affiliated with it, and have produced substantial revenues and profits for plaintiff.

12. Among such programs which are or may be within the terms of the Rules, and which we are informed and believe the

Commission considers as coming within the Rules, are the following:

“Stop the Music” (radio show)

“Stop the Music” (television show)

The amended complaint further alleges that unless the Commission's Order and the Rules be permanently enjoined and set aside, plaintiff's applications for renewal licenses for its broadcasting stations and for permits or licenses to extend its system will automatically be denied and its investments will be destroyed; or in any event plaintiff will be forced to discontinue the broadcasting of programs which may be within the Commission's Rules and plaintiff will suffer irreparable injury; that the Order and Rules are beyond the jurisdiction and authority of the Commission, violate the provisions of the Administrative Procedure Act, and are illegal and void; that the Rules are in violation of certain provisions of the Constitution of the United States and of the amendments thereto.

The prayer for relief asks that a three-judge court be constituted to hear and determine the action; that plaintiff be granted an interlocutory injunction; and that upon final hearing and determination of this action, the court “enter a decree permanently enjoining, setting aside, and annulling said Order of the Commission adopted August 18, 1949, and the Rules adopted thereby.”

Annexed to the amended complaint of the American Broadcasting Company is a description of its “Stop the Music” program—the radio version and the television version. The contestants are of two kinds: telephone participants and studio participants. The telephone participants

are selected by lot or chance from telephone directories. The telephone participant is not required to be listening at his radio to the broadcast at the time he is called. If the telephone participant fails to identify the melody, a studio participant is given an opportunity to do so. The prizes are furnished by the manufacturer, in return for a brief advertisement of his product. Those who are selected from the television audience express in advance, through postcards, their desire to participate. From the cards received a random selection is made and the participants are telephoned.

An affidavit of G. B. Zorbaugh, Secretary and Acting General Attorney for American, is submitted in support of American's motion for a summary judgment. Annexed to it are many exhibits which are also annexed to the affidavits submitted by National or Columbia. They will be hereinafter considered. But one thing should be noted now. The Solicitor of the Post Office Department in a letter of May 9, 1949, advised American that the postcard in relation to the "Stop the Music" program would not be regarded as unmailable matter under the postal lottery statute. He added that whether or not the program conflicted with Section 1304 would be for the Federal Communications Commission to determine.

Further, in May 1949 the Solicitor of the Post Office sent the attorneys for the Columbia Broadcasting System a copy of a general ruling made by the Solicitor for the benefit of all the postmasters, in February 1947, from which the following is quoted:

In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the "consideration" involves for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present. (P. O. Bulletin February 13, 1947.)

The amended complaint of the *National Broadcasting Company* alleges the jurisdictional basis of the action; the order and rules of the Federal Communications Commission; the extent of the National Broadcasting Company's radio and television network; the annual income from the programs of National Broadcasting Company that would be affected by the Commission's Order and Rules; and a description of its four programs thus affected. "You Bet Your Life" is a studio audience participation program; "The \$64 Question" is also a studio program; "What's My Name" is a studio and listening audience program; and "Double or Nothing" is a program in which the primary participation is by members of the studio audience, although members of the listening audience are invited to submit questions on a label of one of the sponsor's products. On the "What's My Name" program there is a selection at random of participants from the listening audience.

The amended complaint alleges the importance of these programs to National Broadcasting Company and the danger to it of a loss of its license when it is up for renewal, if the Commission enforces its rules in relation to Section 1304 of the United States Criminal Code. There are also allegations that the Commission is without power to promulgate or enforce the rules; that they incorrectly interpret Section 1304; that the rules violate provisions of the Communications Act and the Administrative Procedure Act; and finally that they are unconstitutional under the First, Fifth, and Sixth Amendments, and under Clause 3 of Section 9 of Article 1 (Bill of Attainder). The prayer for relief asks that after final hearing, the three-judge court adjudge and decree that the Commission's Order is beyond the lawful authority of the Commission, in violation of plaintiff's legal rights and wholly void; and that the Commission's Order be vacated and set aside and the enforcement thereof perpetually restrained and enjoined. Annexed to the amended complaint are the scripts of the National Broadcasting Company programs mentioned above.

To the affidavit submitted by Mr. Margraf, Vice President and General Attorney of National Broadcasting Company, on the motion for summary judgment, there are a number of exhibits annexed, among them the following: a copy of Chairman Fly's letter of December 30, 1943, addressed to Senator Wheeler, then Chairman of the Interstate Commerce Committee, asking that he support certain legislation (draft enclosed) directed at radio programs "where members of the radio audience not in the studio are selected

by lot or chance to win a prize if they can show that they were listening to the particular program". The draft of the proposed new Section 316 would have prohibited the broadcasting of "any program which offers money, prizes or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance".

Mr. Margraf's affidavit also annexes copies of letters sent by the Commission's Chairman to the Attorney General's office in February and March 1940, calling his attention to the following programs "alleged to be in violation of Section 316 of the Communications Act of 1934." The "Meads Bakery Mystery Woman" program; the "Pot of Gold" program; the "Dixie Treasure Chest" program; the "Sears Grab Bag" program; the "Especially for You" program; the "Musico" program; the "Songo" program. On April 20, 1940, the Attorney General wrote the Commission that after careful consideration no action was warranted by the Department in the "Dixie Treasure Chest" program. On the same day similar letters were sent by the Attorney General to the Commission in respect to the "Sears Grab Bag" program, the "Especially for You" program, the "Songo" program and "Musico".

Mr. Margraf's affidavit also annexes documents showing that in 1939 the Solicitor of the Post Office made two contradictory rulings with respect to whether a radio program, known as "Musico" was a lottery. On July 1, 1939, he ruled that the program did not violate the Federal lottery laws. On September 29, 1939, he ruled that the "Musico" program did violate

the Federal lottery laws. When the attorneys for Columbia Broadcasting System inquired in 1949 about those two rulings, the Solicitor of the Post Office replied on May 3, 1949: "It is likely that if the Musico plan were submitted to this office today, it would be held, in view of the change reflected in the enclosed notice (a general ruling for all postmasters concerning prize activities dated February 13, 1947), not to conflict with the postal lottery laws." The Solicitor also ruled on March 2, 1950, concerning the radio program "Truth and Consequences" that the contest post cards were mailable, although they were used for a random selection of contestants. The Commission had issued its proposed interpretative rules in August 1949.

The amended complaint of the *Columbia Broadcasting System* alleges the statutory provisions under which this action was instituted; the corporate organization of plaintiff; and the nature and extent of plaintiff's nation-wide radio network and television network. It also alleges that "Sing It Again" and "Hit The Jackpot" are two network programs which involve the award of prizes; the revenue those programs produce; how the contestants from the listening audience are selected at random from phone books; and that on the "Hit the Jackpot" program studio contestants were selected by prebroadcast interviews and nonstudio contestants were selected by chance from post cards sent in. It is alleged that because of the Commission's Rules, sponsors have discontinued the programs; that there never has been any court adjudication that these programs violate Section 1304 of the United States Crim-

inal Code; and that there is no finding of fact by the Commission that the said program or programs similar thereto "have had a demoralizing or other deleterious, harmful or evil effect on the public". The amended complaint further alleges that plaintiff's stations have a value of many millions of dollars which will be destroyed if its licenses therefor are not renewed. Finally, it is further alleged that the Commission's Rules do not correctly interpret and apply Section 1304 of the United States Criminal Code; that they violate provisions of the United States Constitution and amendments thereto; that they violate other statutes of the United States (the Communications Act and the Administrative Procedure Act); and that plaintiff will suffer irreparable damages unless it is accorded relief in this action. The prayer for relief seeks a permanent injunction and a judgment setting aside the Commission's order of August 18, 1949, and the rules adopted thereby.

Annexed to the amended complaint are transcripts of the program "Sing It Again" and of the program "Hit the Jackpot"; also copies of the Commission's Order, Opinion, and Rules.

In support of its motion for summary judgment the Columbia Broadcasting System, Inc., submits an affidavit of Mr. Freund, one of plaintiff's attorneys, to which he annexes copies of the judgment (November 1939) in the case of *Clef, Inc. v. Peoria Broadcasting Company* in the Circuit Court of Peoria County, Tenth Judicial District, Illinois. That judgment held that the radio program "Musico" was not a lottery and did not violate any statutes of the United States. Mr.

Freund also refers to various rulings of the Post Office Department; and to the opinions of the Attorney General in April 1940 in relation to a number of radio programs which were submitted by the Federal Communications Commission to the Department of Justice for action under Section 316 of the Communications Act. All of these programs were listed and discussed in the affidavit submitted by the National Broadcasting Company on its motion. The Commission's letter to Senator Wheeler dated December 30, 1943, is also referred to.

In each of the three actions *the defendants* filed no answer but made a countermotion for an order dismissing the amended complaint of the plaintiff, or, in the alternative, directing that summary judgment be entered in favor of the defendants. The ground for the motion to dismiss the amended complaint is that "plaintiff fails to state a claim upon which relief can be granted." The ground of the motion for summary judgment is that the amended complaint and its exhibits, the affidavit, and other papers show that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. Defendants' motion in each action was supported by an affidavit of the Commission's general counsel in which he recites the various steps taken preliminary to the adoption of the rules. The affidavit states that "oral argument was held before the Commission *en banc*" and that "Commissioners Coy, Chairman, Hyde, and Jones did not participate in the adoption of the Report and Order of August 19, 1949, and Commissioner Hennock dissented from its adoption." He also

states that the United States District Court, in the Northern District of Illinois, and this Court, having decided to issue restraining orders, "The Commission, on September 21, 1949, issued an order postponing the effective date of said rules until at least thirty days after the ultimate determination of these actions."

The general counsel's affidavit further states:

4. Plaintiff broadcasts one or more programs which contain features comprehended by one or more of the rules in issue in this case. After such rules become effective, the failure of plaintiff to discontinue the broadcasting of any or all of such programs would result in setting for hearing applications for renewal of licenses filed by plaintiff and, upon a finding that such programs have been or will continue to be carried, such applications would be denied in accordance with the policy set out in the rules in issue.

In defendants' notice of motion in the National Broadcasting Company action, defendants also ask that this court strike paragraphs 13, 14, and 16 of the amended complaint in that action, on the ground that "the programs described in paragraphs 13, 14, and 16 of the amended complaint are not within paragraph (b) of the rules in issue and these paragraphs are therefore immaterial and impertinent." National Broadcasting Company does not oppose defendants' motion to strike the paragraphs and for that reason the motion will be granted.

THE LOTTERY STATUTE

Section 1304 of Title 18 (the United States Criminal Code) provides:

§ 1304. *Broadcasting lottery information.*—Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense. June 25, 1948, c. 645, 62 Stat. 763.

Said section 1304 is one of five sections (§§ 1301 to 1305) which constitute "Chapter 61—Lotteries" of Title 18. Section 1301 deals with "Importing or transporting lottery tickets"; Section 1302 with "Mailing lottery tickets or related matter"; Section 1303, with "Postmaster or employee as lottery agent"; Section 1304, with "Broadcasting lottery information"; and Section 1305, with "Fishing contests."²

² The reviser's notes on these sections in connection with the 1948 Congressional revision of the United States Criminal Code show that Sections 1301, 1302, and 1303 are basically similar in language to corresponding provisions of the 1909 Revision. Section 1304 is practically the same as Section 316 of Title 47, U. S. C. (the Communications Act), which was adopted in June 1934.

The four sections (§§ 1301-1304, incl.) use the same terminology—"any lottery, gift enterprise, or similar scheme offer-

The Federal lottery statute does not define a lottery. The term "lottery" should be given its usual or popular meaning.³ Since it was part of the Federal Criminal Statute for so many years

ing prizes dependent in whole or in part upon lot or chance." Section 1304 in another respect also uses the same terminology as Section 1302, which prohibits "the mailing of any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery," etc. Section 1302, according to the 1948 Reviser's Note, was derived from R. S. 3894 and various Acts dating back at least to 1876. It may be assumed that when Section 316 of the Federal Communications Act was originally enacted in 1934 as part of the Federal Communications Act, it was modeled on the U. S. Criminal Code provision against mailing lottery tickets and related matter (former § 336, U. S. Criminal Code).

In fact, a prosecution under the mailing statute (former § 336) was sustained where, as a result of advertising by radio broadcast, the mails were used in furtherance of a lottery. *Horwitz v. United States* (C. A. A. (5) 1933), 63 F. 2d 706.

Section 1305 was not adopted until August 16, 1950. The Congress was prompted to adopt said section because the Postmaster General had ruled that "publications containing advertisement of fishing contests involving the three elements of prizes, consideration, and chance" were unmailable under the lottery laws. The contestants were required to pay an entry fee. The Legislative History of Section 1305 (U. S. Code Congressional Service; 81st Congress, Second Session, 1950, Vol. 2, p. 3010) shows that the House of Representatives Committee favored the Bill because it was their "considered judgment that Congress, in enacting the lottery laws, never envisaged their application to such innocent pastimes as the typical fishing contest, which has a solid basis of respectability and wholesomeness far removed from the reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid.

³ *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 561; 54 C. J. S. 843 and 862, citing cases.

before the Federal Communications Act was adopted in 1934, the term "lottery" should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code.⁴ *Brown v. Duchesne*, 60 U. S. 183; *Burnet v. Harmel*, 287 U. S. 103; *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342; *N. L. R. B. v. John W. Campbell, Inc.*, 159 F. (2d) 184 (CCA (5) 1947).

ADOPTION OF THE COMMISSION'S INTERPRETATIVE RULES

The interpretative rules in relation to Section 1304 of the United States Criminal Code, which the Commission adopted August 19, 1950, read as follows:

Lotteries and Give-Away Programs.—

(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part

⁴ A "gift enterprise" is one in which the purchaser of an article is given a chance to win a prize. 54 C. J. S. 850. When a gift enterprise involves the essential elements of a lottery (chance, consideration, a prize) it is unlawful. *Matter of Gregory*, 219 U. S. 210.

or all of such prizes." (See U. S. C. § 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished, or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the

phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

[By the words "winner or winners" as used in paragraphs (1), (2), (3) and (4) of subdivision (b), the Commission intended to include "contestants," according to the Commission's counsel.]

Paragraph (a) incorporates the language of Section 1304. Paragraph (b) (1) applies to a "prize enterprise" as well as a lottery.

The proposed Rules were considered at a hearing of the full Commission at which these plaintiffs and other interested parties were present, on notice. The hearing afforded the plaintiffs an adequate opportunity to present the grounds of their objections in both oral argument and briefs, and they availed themselves of that opportunity. Exhibit "A," consisting of two bulky volumes submitted by the Government on these motions, shows how widespread and varied were the sources and contents of the responses received by the Commission concerning the proposed rules, and the comments of the various publications in relation thereto.

It was not necessary for the Commission to take testimony before adopting the Rules. The procedure followed by the Commission was appropriate for the matter under consideration. The rule-making power was exercised through a procedure that conformed to the Administrative

Procedure Act [T. 5 U. S. C. § 1003 (b).] The Commission was not adjudicating any controversy which would require a hearing and the application of trial procedure. That might come later, in a specific case, when an application for a renewal license would be under consideration.

RULE-MAKING POWER OF THE COMMISSION

The Communications Act specifically empowers the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions" [T. 47 U. S. C. § 154 (i)]; and Section 303 (r) grants the Commission the same rule making power "to carry out the provisions of this chapter." The Commission had the authority to make orders, rules and regulations in relation to broadcasting programs to implement the provisions of Section 1304 of Title 18 U. S. C. (formerly § 316 of the Federal Communications Act), and could proceed by general rule or by individual ad hoc decisions in its discretion. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U. S. 194. The Commission did not have to await a judicial determination declaring a certain type of program to be in violation of said sections before formulating its Rules. But the Rules could not declare certain types of programs to be lotteries, if as a matter of law they were not lotteries and would not constitute a violation of said sections. The authority to make rules is not the power to make law. *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 190 F. (2d) 326 (CCA (6) 1951).

The rules as adopted, constituted a warning to all existing licensed broadcasting stations that, if their "give-away" programs violated the new rules, that fact would be considered by the Commission when the stations made application for a renewal of their licenses. Under Section 307 of the Communications Act of 1934 as amended, no broadcasting license may be granted for more than three years or for more than five years in the case of other licenses. License renewals are similarly limited. An applicant for a renewal license is entitled to a hearing on his application [§ 309 (a) of the Act]. The Commission may refuse to renew a license for violation of any regulation authorized by the Act [§ 312 (a)]. The refusal to renew a license for a violation of the Commission's rules is in effect a sanction to enforce compliance with the rules, but it is a proper exercise of the Commission's power if the station has deliberately violated a rule of the Commission which had been duly promulgated and was within the scope of the Commission's rule-making powers. Section 9 (a) of the Administrative Procedure Act, prohibiting unauthorized sanctions, does not apply. *Regents of the University of Georgia v. Carroll*, 338 U. S. 586. In any specific case the station would have the right to a court review of any order of the Commission declining to renew the station's license [§ 402 of the Act]. But the enforcement of the Rules, by the refusal of a renewal license, would be a drastic penalty and sanction. *Columbia Broadcasting System v. United States*, 316 U. S. 407, 418.

Plaintiffs' counsel argue that these rules in relation to "giveaway" programs are neither "necessary in the execution of its (Commission's) functions", nor "necessary to carry out the provisions of this Act (the Federal Communications)." If it is a function of the Commission to determine who are properly qualified to operate broadcasting and television stations and to receive licenses or renewal licenses therefor [T. 47 U. S. C. § 303 and §309], rules stating the required qualifications are necessary to the execution of that function of the Commission; and if under the provisions of the Act, the Commission is required to pass upon applications for licenses and license renewals [§ 303 and § 309], rules barring applicants who would broadcast programs which would be in violation of a statute are necessary to carry out the provisions of the Act. Even though it may not be a function of the Commission to enforce the criminal law, the Commission would have the power to bar any applicant who violated the criminal law. Section 1304 of the United States Criminal Code is so closely identified with the field in which the Commission functions that at one time it was part (§ 316) of the Federal Communications Act. The "public interest, convenience or necessity" standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding. Although Congress by a specific enactment authorized the Postmaster General to deny the use of the mails to lotteries and gambling schemes [39 U. S. C. § 259 and § 732; *Public Clearing House v. Coyne*, 194 U. S. 497], it was not necessary that Congress specifically

authorize the Commission to take action against a broadcasting company which violated Section 1304 of the Criminal Code because the licensing power, specifically conferred on the Commission under Sections 303 and 309 of the Act, would include that authorization.

It is also urged by plaintiffs that Section 326 of the Act withholds from the Commission "the power of censorship" and bars the issuance of "any regulation which shall interfere with the right of free speech by means of radio communications" and that therefore the Commission was without the authority to issue these rules as to give-away programs. As will be shown later, the media of free speech are not above the provisions of the criminal law enacted for the protection of the general public; and the press, when using the mails, is barred under Section 1302 of Title 18, United States Code from doing the same things that broadcasting stations are prohibited from doing under Section 1304.

THE COMMISSION'S RULES [(B) (2), (3), AND (4)] WOULD APPLY TO PROGRAMS THAT ARE NOT CRIMES UNDER SECTION 1304 OF TITLE 18

A criminal statute must be strictly construed, even though it may be remedial in its nature and its purposes are to protect the general public. *United States v. Halseth*, 342 U. S. 277; *United States v. McGuire*, 64 F. (2d) 485 [C. C. A. (2) 1933]. Rules of the Commission which are based on a criminal statute should likewise be strictly construed, especially where they are supported by a penalty and sanction more drastic than fines. *Columbia Broadcasting System Inc. v. United States*, 316 U. S. 407. The Rules cannot go be-

yond the Statute which they seek to implement. If the statute ought to be expanded to include give-away programs, that is solely within the province of Congress. *United States v. Williams*, 341 U. S. 70.

The plaintiff's attorneys argue that the Rules fail to conform to the legal definition of a lottery, and that the Commission has erroneously interpreted Section 1304 of the United States Criminal Code. "The essence of a lottery is a chance for a prize for a price." *Commonwealth v. Wall*, 295 Mass. 70. The specific programs under attack by the government in these three actions offer prizes, and at least some of the contestants for the prizes are selected by lot or chance. In some instances, from the thousands of radio listeners a number of contestants are selected by the spinning of a wheel, which first determines the number of a phone book, next a page thereof; and finally a name and phone number on that page. The telephone number is then called and if the person answering is at the time listening to the program, or is able to give a "password" or an answer previously disclosed on the program, he becomes one of the contestants for the principal prizes. Even if he does not win, he receives a consolation prize on some programs. On television programs, the contestants, in some instances, are selected from the invisible audience at random, from post cards sent in by prospective contestants.

The contestants selected from studio audiences are usually interviewed in advance. Their qualifications are considered by the management before the selection is made. Where the contestants

on the program come solely from the studio audience and they are not selected by chance, it would seem that an essential element of a lottery is lacking. Where some of the contestants are selected by telephone calls in the manner above described, the Commission contends that the element of chance is involved in their selection. I agree with that contention.

THE ACT OF LISTENING TO A BROADCAST OF A "GIVEAWAY" PROGRAM, OR VIEWING IT ON TELEVISION, DOES NOT CONSTITUTE A "PRICE" OR "VALUABLE CONSIDERATION," WHICH IS AN ESSENTIAL ELEMENT OF A "LOTTERY"

Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown, in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. The Commission contends that something of value is furnished by the prospective participants because they become part of an invisible audience, which in the aggregate is a thing of value to the station broadcasting the program and to the advertiser who sponsors the program. To the station, because it can sell the program and its audience to an advertiser; to the advertiser, because he can use the program as a vehicle for "commercials" pushing the sale of his merchandise.

We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many

and varied. It would be a mistake to assume that every one who listens to the program on the radio or views it on television, does so in the hope that he may receive a telephone call to act as a participant and win a prize; but that many may harbor that hope is probably true, otherwise that feature of the program would not be included. If it adds to the value of the program for a sponsor it has a money value to the broadcasting station.

It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. *Griffiths Amusement Co. v. Morgan* (Tex.), 98 S. W. 2d 844. It is the value to the participant of what he gives that must be weighed. *People v. Cardas*, (Cal.) 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a "legal detriment" to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a "price" or "thing of value" paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. *Commonwealth v. Wall* (Mass.), 3 N. E. 2d 28; *State ex rel Stafford v. Fox Great Falls Theatre Corp.* (Mont.), 132 P. 2d 689. *People v. Burns*, 304 N. Y. 380. There are cases to the contrary (see footnotes on p. 848 of 54 C. J. S.) but this seems the more reasonable view.

Counsel for the government state that of the decided cases, the one that most clearly approaches the factual situation of the "give-away" program is *Maughs v. Porter*, 161 S. E. 242 (Va. 1931). In that case defendant, an auctioneer, in order to attract a large audience, advertised that everyone who attended the auction sale, whether he bid thereat or not, would be given a chance on an automobile. Plaintiff attended the sale, received a number and her number was drawn as the winner of the automobile. The defendant refused to deliver the car to plaintiff. She sued. The defense of lack of consideration for the promise of defendant was resolved in plaintiff's favor, the court holding that attendance at the sale, which plaintiff was not legally obligated to attend, was a legal consideration. But the court went on to say that it was also a consideration furnished by plaintiff as a participant in a lottery and since a lottery was illegal under the laws of Virginia, the agreement was unenforceable. That case has been criticized in the Law Reviews.⁵

⁵ The Virginia Law Review (48 Va. Law Review 465) expressed the view that the general concept of the kind of valuable consideration, as an element of a lottery, was a monetary or pecuniary consideration. The University of Pennsylvania Law Review (80 U. of Pa. Law Review 744) thought that the Virginia court erred in the *Maughs* case when it held that plaintiff's attendance at the auction was sufficient consideration for the ticket for the drawing of the automobile, insofar as a lottery statute was concerned. The article states: "But it does not follow that a consideration sufficient to support a contract is necessarily the kind of consideration contemplated by the statute prohibiting lotteries." The Harvard Law Review (45 Harvard Law Review 1206), in a note on the type of consideration requisite as an essential

Courts of other states have not followed the Maughs case. In *Darlington Theatres v. Coker*, 2 S. E. (2d) 782, the Supreme Court of South Carolina stated that *Maughs v. Porter* was not in accord with "the general current of authority in America". In *State v. Big Chief Corp.*, 13 A. (2d) 236, the Supreme Court of Rhode Island held that *Maughs v. Porter* was against the great weight of authority. In *State v. Fox Kansas Theatre Corp.*, 62 P. (2d) 929, the Supreme Court of Kansas referred to *Maughs v. Porter* as representing an "extreme instance of the feature of consideration". And in *People v. Shafer*, 289 N. Y. S. 649, the court considered *Maughs v. Porter* as not controlling and as having been subject to severe criticism. The Shafer case was later affirmed by the New York Court of Appeals, 273 N. Y. 475.

A recent case in this Second Circuit (*Garden City Chamber of Commerce, Inc. et al. v. Wagner*, 100 F. Supp. 769; 192 F. 2d. 240; 104 F. Supp.

element of a lottery, states: "Money, of course, satisfies this requirement. The amount is unimportant; a cent is enough; the money need not even be legal tender. Other property with monetary value serves as consideration, and services would also be adequate. Usually the presence of consideration is obvious." In commenting on the Maughs case a footnote in the article states: "In any event, the purpose of the lottery laws is to prevent people from giving up money or money's worth in the hope that chance will make their investment profitable, not to forbid them from performing acts having no intrinsic value to anyone. Perhaps the decision can be sustained on the ground that while people did not have to bid at the auction to be eligible to receive the automobile, it was reasonably probable that this would be the case."

235) appears to be very much in point. In that case the defendant, Postmaster of Garden City, refused to allow certain postal cards to be transmitted through the mails on the grounds that they were part of a lottery scheme. The plaintiffs sought an injunction against the Postmaster. In describing the scheme, designated as a treasure hunt, Judge Byers stated that it involved the following steps:

(a) Each recipient of a card detaches therefrom a removable coupon bearing the same printed number as does the card itself. The sender retains the coupon, and (b) after mailing the card to the Chamber of Commerce, he (c) looks into the shop windows of the storekeepers who participate in the plan. (d) If he sees his number attached to an article displayed in one of those windows, he enters the store, presents his coupon, and receives that article.

The Judge then concluded:

Manifestly this is a joint effort to promote window shopping, which hitherto has not been deemed even faintly illegal or immoral.

Judge Byers further concluded that the Solicitor for the Post Office had "ruled that to be a consideration, which by no common-sense process of reasoning can be so designated," because the Solicitor had mistakenly assumed that the kind of consideration necessary in a lottery case was only what would suffice in an action upon contract.

The Postmaster appealed to the Court of Appeals, Second Circuit, and moved in that court for a stay of Judge Byers' order pending appeal.

Judges A. N. Hand, Chase, and Clark heard the application. The court held (Judge Clark dissenting) that the Postmaster's motion for a stay should be denied for the reasons stated in Judge Byers' opinion. Judge Clark, in a dissent, viewed the scheme as a lottery. He held in effect that since "the merchants providing the prizes secured the inestimable advertising boon of bringing the potential prize-seeking customers right into their stores, following hard upon diligent examination of the shop window displays to discover the lucky prize numbers" there was sufficient consideration to make the scheme a lottery, and that the treasure hunters' participation furnished the requisite consideration.⁶

If window shopping by the treasure hunters was not such a "consideration" as would make the treasure hunt scheme a lottery, is listening to the radio or watching a television screen the type of consideration that would make a giveaway program a lottery? If not, then subdivisions 2 to 4 inclusive of paragraph (b) of the Commission's rules go beyond the scope of the lottery statute and are an unlawful exercise of the rule-making power.

The danger of "impoverishment" to the participants and the development in them of a "gambling spirit" have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, *Horner v. United States*, 147

⁶ The Postmaster's appeal from Judge Byers' order was later abandoned, and Judge Byers later ruled that his decision on the plaintiff's original application for an injunction had thus become a final determination of the controversy. 104 F. Supp. 235.

U. S. 449, quotes from decisions and state laws against lotteries, and cites the "pernicious tendencies" which the State laws were designed to prevent. See, also, *Phalen v. Virginia*, 49 U. S. 163 at p. 168. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3), and (4) of paragraph (b) of the Commission's Rules. Those programs cannot be classed as a "reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid." (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote 2 above.)

In the legal opinions given by the United States Attorney General to the Commission in 1940 the type of program now condemned by the Commission's Rules as a lottery was held not to be covered by Section 316 of the Federal Communications Act (now § 1304 of the Criminal Code). [See Exhibits E, F, G, H, I, and J annexed to the American Broadcasting Company's affidavit herein.] The Commission thereupon sought to have the Congress specifically prohibit this type of program and wrote Senator Wheeler on December 30, 1943. [See Exhibit "D" annexed to the American Broadcasting affidavit.]⁷ The In-

⁷ In his letter to Senator Wheeler Chairman Fly stated: "The problem of money give-away programs is a very troublesome one in broadcasting." * * * "Under the present section 316 of the Communications Act the Commission has been unable to deal adequately with the problem." * * * "I believe the matter is serious and important enough to warrant action by Congress at this time." The Chairman enclosed a proposed draft of a new Section 316 directed at give-

terstate Commerce Committee of the Senate (of which Senator Wheeler was Chairman) took no action on Chairman Fly's request.

This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission's membership. There are seven members of the Federal Communications Commission. The rules under attack were adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3), and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar "give-away" programs, rendered by the Attorney General in 1940, although the Attorney General now appears in support of the Commission's new rules.

These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and interstation relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is not authoritative. *Interstate Commerce Comm'n. v. Service Trucking Co.*, 186 F. (2d) 400; *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 190 F. (2d) 326.

away programs. The Chairman also stated in his letter that: "Under this type of program listeners are attracted not by the quality of the program but simply by the hope of being awarded a valuable prize simply by listening to a particular program. This is not good broadcasting."

We need not consider as applicable the admonition of Judge Frankfurter in *National Broadcasting Co. v. United States*, 319 U. S. 190 at page 218, that the courts should hesitate to substitute their own views for those of the Commission in matters peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute (§ 1304) and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts.

CONSTITUTIONAL QUESTIONS

THE FIRST AMENDMENT—FREE SPEECH

Broadcasting and television are entitled to the protection of the First Amendment to the Constitution, guaranteeing freedom of speech and of the press. The amendment has been held to apply to moving pictures, "like newspapers and radio." *United States v. Paramount Pictures*, 334 U. S. 131, 166. But that guarantee does not shield either the individual or the press, or any media for the communication of thought, from the application of criminal laws designed for the protection of the general public. Free speech is not absolute but relative. *Dennis v. United States*, 341 U. S. 494. The Rules of the Commission, in their subject matter (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amendment. *In re Rapier*, 143 U. S. 110; *Horner v. United States*, 143 U. S. 207; *Donaldson v. Reed Magazine*, 333 U. S. 178; *National Broadcasting Co. v. United*

States, 319 U. S. 190 at page 227; *Johnston Broadcasting Co. v. Federal Communications Comm'n*, 175 F. (2d) 351. But in so far as some of their provisions [paragraph (b) (2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of "censorship" and to that extent they would be in violation of the First Amendment.

The merits of the "give-away" programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that "we can see nothing of any possible value to society" in these programs, "they are as much entitled to the protection of free speech as the best of literature" or music. *Winters v. New York*, 333 U. S. 507. When the radio or television audiences tire of them, they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the "give-away" programs as lotteries, if as a matter of law they are not.

Plaintiffs assert that the rules, if given effect, would deprive them of their property without due process of law, in contravention of the Fifth Amendment to the Constitution,⁸ and would sub-

⁸ Amendment V—*Capital crimes; due process*.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, limb, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ject them to punishment for a crime without a jury trial, in violation of the Sixth Amendment and Article III, Section 2, Clause 3 of the Constitution; and that the Rules constitute a Bill of Attainder in violation of Article I, Section 9, Clause 3.

In formulating the rules in question the Federal Communications Commission was motivated by the belief that the "give-away" programs involving radio and television audience participation fell within the prohibitions of Title 18 U. S. C. A. Section 1304. The rules, according to the Commission's report, were intended to give effect to the Congressional intent expressed in Section 1304, to prevent the furtherance of lottery schemes through the use of interstate broadcasting media.

Under the provisions of the Federal Communications Act the broadcasting company would be entitled to a trial and would have a right of review in the courts, including the right to an injunction pendente lite. The provisions of the Federal Communications Act and of the Administrative Procedure Act would have to be followed. That would be a compliance with the due process amendment. *Columbia Broadcasting Co. v. United States*, 316 U. S. 407.

The power of the Federal Communications Commission to grant or withhold licenses in the public interest and to make such rules as will carry out the intendment of the Federal Communications Act implies a grant of authority to employ the means necessary to discharge the powers conferred. *Stahlman v. Federal Comm. Com'n.*,

C. C. A. (D. C.) 1942, 126 F. (2d) 124; *Federal Comm. Com'n v. Pottsville Broadcasting Co.*, 309 U. S. 134. The means chosen by the Commission to compel compliance with its rules was to deny a license or a renewal license to any applicant whose radio or television activities were found to violate the Commission's Rules. *Communications Commission v. W. O. K. O.*, 329 U. S. 223. A finding by the Federal Communications Commission that its rules had been transgressed would not amount to a conviction for a crime [*Mansfield Journal Co. v. Federal Comm. Com'n*, C. C. A. (D. C.) 1950, 180 F. 2d 28]; nor would the denial of a license to an applicant be a punishment for a crime. The enforcement of the rules would not violate the Sixth Amendment, or Article III, Section 2, Clause 3, or Article I, Section 9, Clause 3 of the Constitution.*

* Amendment VI—*Jury trial for crimes, and procedural rights.*—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Art. III—Section 2, clause 3. *Criminal trial by jury.*—The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. I—Section 9, clause 3. *Bill of attainder and ex post facto laws.*—No Bill of Attainder or ex post facto Law shall be passed.

The purpose of the Sixth Amendment and of Article III, Section 2, Clause 3, was to assure a defendant, in a criminal prosecution, that he would have a speedy and public trial by an impartial jury in a proper venue with the right of confrontation, the assistance of court process and of counsel. Article I, Section 9, Clause 3, prohibits the passage of any Bill of Attainder, which has been described as a legislative act which inflicts punishment without a judicial trial. *United States v. Lovett*, 328 U. S. 303. Neither of the above amendments nor the specified sections of the Constitution have any application to the facts of these cases.

The parties having stipulated the facts, no findings of fact need be made. The stipulation and defendants' motion concede plaintiffs' allegations of "irreparable injury." Our conclusions of law sufficiently appear in the above opinion and in the relief to be granted in the final judgment.

RELIEF GRANTED

Plaintiffs' motions for summary judgment in their favor are granted to this extent, that the Federal Communications Commission will be permanently restrained and enjoined from enforcing subdivisions (2), (3), and (4) of paragraph (b) of its interpretative rules adopted August 18, 1949, in relation to radio and television give-away programs; and the Commission's order adopting the rules will, to that extent, be vacated and set aside.

As to paragraphs (a) and (b) (1) of the said rules, plaintiffs' motions for summary judgment and an injunction are denied; and the Commis-

sion's order, adopting the rules, is upheld in respect to said paragraphs (a) and (b) (1) of the rules.

Defendants' motions to dismiss the amended complaints are denied. Defendants' motions for summary judgment in defendants' favor are granted only in respect to paragraphs (a) and (b) (1) of said rules. Defendants' motion to strike paragraphs 13, 14, and 16 of the National Broadcasting Company's amended complaint is granted.

Let a final judgment be settled accordingly, on ten days' notice.

Dated, February 5, 1953.

VINCENT L. LEIBELL,
United States District Judge.

EDWARD WEINFELD,
United States District Judge.

In the United States District Court for the
Southern District of New York

Civ. No. 52-24

AMERICAN BROADCASTING COMPANY, INC.,
PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Civ. No. 52-37

NATIONAL BROADCASTING COMPANY, INC.,
PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Civ. No. 52-38

COLUMBIA BROADCASTING SYSTEM, INC.,
PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Before Clark, Circuit Judge, and Leibell and
Weinfeld, District Judges. Clark, Circuit Judge
(dissenting).

Judge Leibell's masterly analysis of the case
shows that the only point of doubt or concern is

as to whether "consideration" is given in return for a chance at substantial and valuable prizes or financial awards. Though earnestly argued by the several plaintiffs, the other contentions—some rising to the constitutional level—are unconvincing and I agree with the court in overruling them. But on the one issue which thus proves controlling, I do not feel that my brothers have reached a result which is consistent with law, or, indeed, with reason, and I accordingly dissent.

Before I turn to this, I shall briefly dispose of some underbrush. It seems to me that not only was the Federal Communications Commission justified in tackling this thorny subject, but, indeed, it was its duty to do so and it is to be commended for its efforts at length to have the matter definitely determined. Like the enforcement of all sumptuary or moralistic legislation, there is a natural desire to pass the buck to others; and this may be accentuated where a showing of criminality would be required for the pressing of an indictment. But when the Congress says that "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States" shall not do certain things under pain of fine and imprisonment, 18 U. S. C. § 1304, the licensing authority must surely take some heed of the mandate and act accordingly if it is not to wink at or impliedly approve the law's violations. So it does seem to me that past actions or refusals to act of other governmental agencies or officers have little bearing on our problem. Suffice it to say that not the Commission *and* the Department of Justice are loyally and cooperatively

engaged in advancing what they—and I—think to be a correct interpretation of law. Against this there obviously can be no estoppel to operate against either the United States of America or any one of its agencies.

Now I turn to the specific issue. It is well to recall the statute, now a part of the Criminal Code, 18 U. S. C. § 1304, formerly a part of the Federal Communications Act, 47 U. S. C. § 316, adopted in June 1934. Its prohibition is against “the broadcasting of, any advertisement of, or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme.” I emphasize two matters: (1) Within the prohibition are not merely lotteries, but gift enterprises and any “similar scheme” offering prizes dependent upon “chance”; (2) the statute does not mention “consideration.” I stress the first because there does seem to be a feeling in the case that it concerns “buying” a ticket to the drawing of some grand prize in the good old-fashioned sweepstakes manner. But the statute is much broader, as broad in fact as it could possibly be made for the objectives in view. It is more inclusive, for example, than such a statute as N. Y. Penal Law § 1370 reaching “the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance.” So it is not without significance that when Congress in 1950 wished to validate “any fishing contest not conducted for profit wherein prizes are awarded for the specie,

size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event," it felt it had to do this *by specific exemption*. 18 U. S. C. § 1305. And the omission of any reference to consideration—unlike the New York statute, for example—carries its own meaning. The federal law contains no technical requirement of consideration as such; whatever is read into the statute must be what will carry out its essential purpose.

Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner v. United States*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want; the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme. But it is still possible for anyone—advertiser, broadcaster, or what not—to make pure gifts; the Commission calls attention to the plot of a moving picture of twenty years ago, "If I Had A Million," and says that if "a rich man gives away his millions to persons chosen at random, it may be conceded that no evil would be done and no violation of the law would be involved." So what we are looking for is really some gain to the promoters of the scheme which takes the matter out of the realm of pure altruism.

This, of course, greatly simplified the problem. But I believe it makes a sense of it, too. To inquire whether the broadcasters and their adver-

tising customers are engaged in altruistic operations is of course to supply the answer at once. What they are doing is to purchase time to advertise and vend their wares—indeed the most valuable time conceivable, as is alleged in the papers before us and conceded by all.¹ The time spent by a single listener may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provides so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting moments will not be adequate to learn what the rules are, hear and guess the tune or the answer to the question, and accept and answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as a part of the game until the announcer calls.

¹ Indeed, audiences are already becoming hardened to what were once considered fabulously high give-away bonanzas. See the following item in the N. Y. Times, Dec. 28, 1952, Sunday Radio Section, p. X 11: "HARD TIMES. A doorman from A. B. C.'s Ritz Theatre stood at the corner of Broadway and Forty-eighth Street one morning last week with a handful of tickets. 'Get your free tickets to "Break the Bank,"' he yelled, 'the biggest money-paying show on the air. Offering \$2,900.' In ten minutes he unloaded just two tickets."

My brothers, it seems to me, are drawn away from the natural answer by the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor," but "It is the value to the participant of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal.² And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with defer-

² The statement "a cent is enough" quoted in the opinion from 45 Harv. L. Rev. 1196, 1206, appears to be borne out by the cases cited: *People v. Runge*, 3 N. Y. Cr. R. 85, 34 Hun. 634; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, holding also that not all the participants need pay even the one cent which is currently the consideration; and *Stewart v. State*, 108 Tex. Cr. R. 661, 2 S. W. 2d 440, holding also that the coin need not be current money of recognized value. So, too, services, such as selling a book, are sufficient. *Loveland v. Bode*, 214 Ill. App. 399.

ence—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic popper-corn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recognized in the well reasoned cases, such as *State v. Wilson*, 109 St. 349, 196 A. 757, cited below.

If the issue can thus be made comparatively simple, why has so considerable an amount of concern, if not confusion, developed in the cases? A part of this is undoubtedly occasioned by differences in the governing law; thus cases under the New York statute cited above would hardly be safe authorities under the federal law. But the main reason, I believe, lies elsewhere and, in fact, is not hard to discern. It seems to be found in all cases of attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical. The analogy of the Prohibition Amendment is close. Since the law seems harsh, a search most diligent is made to cut down its more drastic operation; in fact, the mind seems to revolt at enforcement of its harsher elements. That, I think, is the real meaning. If people want to waste their time in listening to radio programs in the hope or off-chance of winning some valuable prizes, why not let them do it. That is a wide-spread attitude, with which, of course, I have considerable sympathy. But I

think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unliked, prohibition into one which is unintelligible. After all, the fate of the Prohibition Amendment showed proper eventual remedy.

My brothers do not collect cases, nor shall I. It is a barren task in this problem. For courts and writers have found or created confusion and doubt, and it does little good to catalogue this. Moreover, as stated, many precedents concern differing legal situations. I shall content myself with a few authorities I consider most apposite. First I cite *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242, the case of a lottery found in attendance at a real estate auction sale where an automobile was to be given away to a person present, not only because it is a leading case, but also because of the friends and enemies it has made. Thus it has been approved in the persuasive case, cited earlier, of *State v. Wilson* 109 Vt. 349, 196 A. 757, holding a theater "bank night" scheme a lottery. Attempts to answer the court's analysis have produced fresh difficulties, forcing one commentator to the extreme, found indeed in several of the opposing cases, of requiring a monetary or a pecuniary consideration, 18 Va. L. Rev. 465, while another, trying to avoid going so far, says that the consideration while present was not "of economic value"—a masterpiece of unreality, particularly as applied here. 80 U. of Pa. L. Rev. 744. Another writer quoted for the "a cent" proposition of note 5. of the opinion concludes some tendentiously critical remarks with this bromidic statement: "Perhaps the decision can

be sustained on the ground that while people did not have to bid at the auction to be eligible to receive the automobile, it was reasonably probable that this would be the case." (!) Pickett, *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1206 n. 37. The requirement of a pecuniary consideration may perhaps be justified under some statutes. Surely, however, that is nowhere a requisite of the federal Act. Further explanation of the requirement of consideration to distinguish away a gift is found in such cases as *Affiliated Enterprises v. Waller*, 1 Terry 28, 40 Del. 28, 5 A. 2d 257; *Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107; *State v. Jones*, 44 N. M. 623, 107 P. 2d 324; *Affiliated Enterprises v. Gantz*, 10 Cir., 86 F. 2d 597; *Central States Theatre Corp. v. Patz*, D. C. S. D. Iowa, 11 F. Supp. 566; *State of Kansas ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929, 109 A. L. R. 698, with annotation at 709; *State of Missouri ex rel. McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862, 100 S. W. 2d 705, 113 A. L. R. 1104, with annotation at 1121. And not without some immediate point are the many decisions upholding F. T. C. orders against the use of lottery devices, such as punch boards, in the distribution of candy. *Consolidated Mfg. Co. v. F. T. C.*, 4 Cir., 199 F. 2d 417, citing cases; *Sweets Co. of America v. F. T. C.*, 2 Cir., 109 F. 2d 296.

The reasoning and the cases cited seem to me rather compelling to sustain the Commission's ruling. Were I more in doubt, I should feel some compunction to uphold the defendants' position out of some deference to the respect due the de-

cisions made by the agencies of government having the prime responsibility. But I do not think resort to that principle necessary. Nor do I find what I should regard as apt authority to the contrary. Perhaps I should make reference to *Garden City Chamber of Commerce v. Wagner*, D. C. E. D. N. Y., 100 F. Supp. 769, 772, for that involved a similar statute, 18 U. S. C. § 1302, covering the use of the mails for lottery. In that case the court said that "the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed." This principle I think cannot be upheld and I understand the plaintiffs herein do not support it. And so further reflection has strengthened my belief in the validity of the position I took in dissent when the case came before us on application for a stay pending appeal, 2 Cir., 192 F. 2d 240. Our consideration was not on the merits, but as the result of a brief hearing on our motion calendar. A motion for a stay of this ingenious scheme of local and neighborhood merchants for Christmas sales was obviously not very appealing; further, it required summary disposition in view of the pressure of time—it was submitted November 13 and decision was filed November 16, 1951; and denial of the stay, carrying the matter beyond the Christmas season, made the question moot for all practical purposes. The case cannot therefore be regarded as a definitive precedent disposing of the issue.

I think it therefore appropriate to reiterate by way of summary that my colleagues suggest no workable dividing line between what is "value" and what is not in deciding what the participants

in these give-away schemes have themselves given. On the contrary, they seem to me to have rejected the understandable tests to which persuasive precedents point. I fear, therefore, that our decision will serve to promote more confusion than it allays. For my part I would dismiss the plaintiffs' complaints on the merits.

INDEX

	Page
Argument	1
Appendix	17
Report and Order, Docket No. 9113	17
Postal Bulletin No. 19642	33

AUTHORITIES

Cases:

<i>Affiliated Enterprises, Inc. v. Gantz</i> , 85 F. 2d 597	14
<i>Affiliated Enterprises, Inc. v. Waller</i> , 40 Del. 28, 5 A. 2d 257 ..	13
<i>Ballock v. State</i> , 73 Md. 1	12
<i>Brooklyn Daily Eagle v. Voorhies</i> , 181 Fed. 579	14
<i>Clef, Inc. v. Peoria Broadcasting Company</i> (unreported)	8
<i>Eastman v. Armstrong-Byrd Music Co.</i> , 212 Fed. 662	11
<i>Furst v. A. and G. Amusement Co.</i> , 128 N.J.L. 311, 25 A. 2d 892	13
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, 192 F. 2d 240, 104 F. Supp. 235	9
<i>Gooch v. United States</i> , 297 U.S. 124	5
<i>Griffith Amusement Co. v. Morgan</i> , 98 S.W. 2d 844	10
<i>Horner v. United States</i> , 147 U.S. 449	12
<i>Maughs v. Porter</i> , 157 Va. 415, 161 S.E. 242	13
<i>Peek v. United States</i> , 61 F. 2d 973	11
<i>People v. Burns</i> , 304 N.Y. 380, 107 N.E. 2d 498	9
<i>People v. Cardas</i> , 137 Cal. App. Supp. 788, 28 P. 2d 99	10
<i>People v. Shafer</i> , 160 Misc. 174, 289 N.Y.S. 649, aff'd 273 N.Y. 475, 6 N.E. 2d 410	9
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773, cert. den. 241 U.S. 675	11
<i>State v. Jones</i> , 44 N.M. 623, 107 P. 2d 324	14
<i>State v. Wilson</i> , 109 Vt. 349, 196 Atl. 757	13
<i>State ex rel. Stafford v. Fox-Great Falls Theatre Corp.</i> , 114 Mont. 52, 132 P. 2d 689	10
<i>State of Kansas ex rel. Beck v. Fox Kansas Theatre Co.</i> , 144 Kan. 687, 62 P. 2d 929	10
<i>United States v. Alpers</i> , 338 U.S. 680	5
<i>United States v. Halseth</i> , 342 U.S. 277	5

Other Authorities:

18 U.S.C. 1304	3, 4, 10, 12
S. Rep. 10, Part 1 on S. 2982, 60th Cong., 1st Sess., p. 22	4

In the Supreme Court of the United States

OCTOBER TERM, 1952

No.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

REPLY TO MOTIONS TO AFFIRM

Appellees seek to have this Court affirm, without argument, a judgment of a divided three-judge district

court which permanently enjoined enforcement of a portion of the Rules and Regulations of the Federal Communications Commission which establish a licensing policy with respect to the broadcast of lotteries (110 F. Supp. 374).

The motions to affirm would foreclose full consideration by this Court of a substantial issue of importance to the administration of the Communications Act which has not heretofore been ruled upon by this Court. These are appeals of right to the only Court to which appeal is permitted by law; yet appellees erroneously treat the appeals as if they were to be judged by the criteria for passing upon a petition for writ of certiorari. To show that the issue raised is too frivolous to merit more than summary consideration, it would seem that, at the least, appellees must establish that the closely reasoned dissenting opinion of the distinguished circuit judge who presided below is patently unsound.¹ This burden has not been met; instead appellees focus attention upon the assertedly anomalous situation in which an agency charged with regulation of the communications industry is seeking from this Court an interpretation of a criminal statute. But the criminal statute in question had its genesis as an integral part of the Communications Act, and it relates exclusively to broadcasting, a matter peculiarly subject to the Commission's jurisdiction. Indeed, violators of the Act will frequently be licensees of the Commission.

¹ We are not aware of any case in which this Court has summarily affirmed the decision of a divided three-judge court on a question not previously passed upon by this Court. Appellees seem to disregard this overwhelming obstacle to their present motions; indeed appellee National Broadcasting Company, Inc. (NBC) actually fails to discuss the dissenting opinion below.

It was manifestly appropriate (as all three judges below agreed) ² for the Commission to interpret and to give effect to this statute in formulating radio station licensing policies. It is equally appropriate for this Court to pass finally and authoritatively on the validity of that interpretation.

I

The basic contention of appellees—that the applicable law is so clearly settled that any further consideration by this Court is superfluous—must be laid to wishful thinking. The role of consideration as an element of a lottery or other similar scheme has never been definitively determined under federal law, and it varies from jurisdiction to jurisdiction under state practice, depending in considerable degree upon statutory differences.

At the outset it must be noted that, unlike a number of state statutes, the statute here involved makes no mention of consideration—valuable or otherwise. 18 U.S.C. 1304 provides:

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of,

² The district court unanimously sustained the statutory authority of the Commission to promulgate rules pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries, and to interpret 18 U.S.C. 1304. It also sustained the Commission's interpretation of Section 1304 with respect to the elements of chance and consideration, except as to subdivisions (2), (3) and (4) of paragraph (b) of the rules. By a divided vote, the court ruled that these subdivisions, which define consideration in terms of listening to, or viewing, programs, incorrectly interpret 18 U.S.C. 1304.

any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

Thus the many cases which give effect to specific statutory requirements that there be monetary or other valuable consideration are of little help in interpreting the federal statute. Secondly, it must be stressed that 18 U.S.C. 1304 is not limited in coverage to schemes which are technically lotteries at common law. Congress was concerned to reach all schemes "savoring of a lottery";³ accordingly it wisely included a prohibition against other "similar schemes" as well as lotteries.

Appellees apparently argue that the "similar schemes" provision is irrelevant. This argument is untenable. Appellee Columbia Broadcasting System seeks to achieve this result by asserting that the Commission's Report and Order adopting the rules at issue did not rely upon that provision. This contention is unfounded. The Report and Order clearly shows

³ See S. Rep. 10, Part 1, on S. 2982, 60th Cong. 1st Sess. (p. 22), referring to the revision and consolidation of the Penal Code in 1909 "so as to bring within the operation of the section all schemes savoring of a lottery." The revised section there referred to contained the language of Section 1304.

that while the Commission felt that the schemes proscribed fall within the category of lotteries, "that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or whether it be more broadly read" (Appendix, *infra*, p. 27).⁴

Alternatively, appellees seek to limit the effect of "other similar schemes" by resort to the familiar principle that criminal statutes are to be strictly construed.⁵ This principle, however, cannot be used to cripple the purpose of Congress to forbid a general class of acts. The recent decision of this Court in *United States v. Alpers*, 338 U.S. 680, is closely in point. In construing a similar comprehensive phrase ("or other matter of indecent character") in an obscenity statute, this Court quoted with approval (p. 683) the statement in *Gooch v. United States*, 297 U.S. 124, 128, that "while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." With full knowledge of the constant attempts to evade anti-lottery laws, Congress wisely used the term "similar schemes" to avoid the possibility of an over-technical construction which might nullify the statute's effectiveness.

⁴ For the convenience of the Court the Report and Order is set out in full in the Appendix, *infra*, p. 17.

⁵ The case of *United States v. Halseth*, 342 U.S. 277, cited by appellee National Broadcasting Company as an example of attempted administrative enlargement of the scope of a statute, is not in point here. It held that the paraphernalia actually sent through the mails in that case was not part of an existing lottery, although it might later be so used. There is no such problem here. The radio giveaway schemes covered by the Commission's rules are presently existing lotteries brought to fruition during the programs.

We submit that the end in view in prohibiting lotteries or other similar schemes clearly comprehends radio giveaway programs of the types covered by the Commission's rules. These programs have the definite purpose of benefitting their sponsors by utilizing the age-old appeal of gambling and get-rich-quick schemes—the chance to get something for nothing or almost nothing. Each of the schemes proscribed contains as an obvious or latent quality the traditional element of exploitation of cupidity and the love of gambling which is characteristic of lotteries and similar devices.

In our Statement as to Jurisdiction we quoted the following convincing reasoning of Judge Clark, dissenting below. We believe that the opinion of the majority and the motions to affirm may be searched in vain for an effective answer to this statement (110 F. Supp. at 392-393):

My brothers, it seems to me, are drawn away from the natural answer by the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor", but "It is the value to the participant of what he gives that must be weighed". Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to

hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense.

Judge Clark's analysis recognizes that the essential distinction between a lottery and an eleemosynary project involving distribution of gifts by chance is whether the scheme is one designed to reap a profit for the promoter. Lotteries are designed to make a profit—directly or indirectly. And that profit is contributed by the participants in the lottery—directly or indirectly. The radio giveaway schemes at bar meet these tests. As the Commission's Report and Order points out (Appendix, *infra*, pp. 27-28), commercial radio broadcasts seek to attract listeners because listener volume is important in securing sponsors for radio time, and the sponsor wants as large an audience as possible to hear his advertising message. The person who is induced to listen by the hope of prizes is conferring a real benefit upon the station and the sponsor. And in the long run, the radio audience as a whole *pays for the prizes* given away and more besides through purchases of the spon-

sored goods. Advertisers buy advertising because it pays.

It is thus apparent that there is consideration present in the time and effort contributed by the listeners, and there is substantial consideration received by the sponsor and the station from the increased listening audience. The court below and appellees apparently regard this consideration as insubstantial. Yet Judge Clark pointed out that a penny would be sufficient consideration to support a lottery and that the majority below apparently recognized that fact. We submit that the difference between the Commission's interpretation of the law on the one hand and that of the majority below and of appellees on the other is not one of broad versus strict interpretation. It is, as Judge Clark, suggested, a rational versus an irrational approach.

We turn now to the authorities which, appellees contend, overwhelmingly support the decision below.

II

There are a plethora of authorities on the place of the element of consideration in lotteries, but the collection of cases proves, as Judge Clark stated below, a somewhat "barren task." This is partly because of the differing statutes on the subject in the various states, and partly because many of the cases have uncritically stated the criteria of lotteries without analysis. A study of the authorities makes clear, however, that (1) there is almost no authority upon the precise issue raised by the case at bar,⁶ and (2) the rationale of the

⁶ In 1939 the Circuit Court of Peoria County, Illinois, held that a radio program called "Musico" was not a lottery. *Clef, Inc. v. Peoria Broadcasting Company*. (Unreported. See Exhibits B-1 and B-2 to Affidavit of Max Freund in support of motion of Columbia

better reasoned cases supports the thesis of the Commission that where a scheme is designed to bring profit to its promoter from the participants directly or indirectly, and where the participants are lured by prizes to be distributed by chance, a lottery exists.

The *only* decision of a Federal court relied upon by the majority of the district court below for the principle that a "price" must be paid is *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E.D.N.Y.). There the district court, in construing a Postal Bulletin requiring "an expenditure of substantial effort or time," found that looking into store windows to find a number entitling the participant to a prize was not consideration. The decision adopted a principle not advocated by the majority below or by any of the appellees, i.e., that lottery consideration consists of a "contribution in kind to the fund or property to be distributed." A stay pending appeal was denied by the court of appeals after a brief hearing on the motions calendar, Judge Clark dissenting (192 F. 2d 240 (C.A. 2)), and the appeal was subsequently not pursued. See 104 F. Supp. 235. The case therefore never had a hearing on the merits before the court of appeals. To say the least, *Garden City* would be a weak reed upon which to base a summary disposition of the present case.

The majority below cited nine decisions by State courts as sustaining its theory of lottery consideration. Five of these decisions (*People v. Shafer*, 160 Misc. 174, 289 N.Y.S. 649, aff'd. 273 N.Y. 475, 6 N.E. 2d 410; *People v. Burns*, 304 N.Y. 380, 107 N.E. 2d 498;

Broadcasting System for summary judgment.) We are aware of no other case on "giveaway" programs.

State ex rel Stafford v. Fox-Great Falls Theatre Corp., 114 Mont. 52, 132 P. 2d 689; *People v. Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99; *State of Kansas ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929) involved state statutes in terms requiring a "valuable" consideration or monetary payment and are of no assistance in interpreting 18 U.S.C. 1304, which has no such requirement. The other four, which are drawn from a large number of conflicting cases with respect to various forms of "Bank Night", are believed to have looked uncritically to the form rather than the substance of the scheme involved. Indeed, in *Griffith Amusement Co. v. Morgan*, 98 S.W. 2d 844 (Tex. Civ. App.), the court apparently recognized that the essential difference between a lottery and a non-lottery was whether there was a truly gratuitous offering, but failed to look at the scheme itself to see whether there was a true gift.

Appellee American Broadcasting Company finds it "unnecessary to review the authorities on the question of consideration as an element of a lottery, in view of Judge Leibell's comprehensive presentation of the authorities in his opinion in the District Court".⁷ The other appellees apparently found it necessary to buttress the authorities cited by the district court. But

⁷ Appellee American Broadcasting Company contends that the Post Office Department has consistently construed lottery consideration as a tangible and valuable consideration. How it can do so in the face of the Post Office's position in the *Garden City* case, *supra*, and the Postal Bulletin there quoted (100 F. Supp. at 771) providing that consideration may involve "an expenditure of substantial effort or time", is difficult to see. The most recent Postal Bulletin (Appendix, *infra*, p. 33) shows that the Department adheres to its general position on consideration, except as that position is cast in doubt by the *Garden City* decision and the decision presently under appeal.

their search unearthed just three decisions by Federal courts on Federal law. Of these, one, *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (C.A. 8) involved no payment of any kind.⁸ Despite this fact, the court stated that consideration had been conceded and decided the case *entirely* upon the element of chance. The second, *Peek v. United States*, 61 F. 2d 973 (C.A. 5) also revolved entirely upon the element of chance, although the opinion contained dicta with respect to valuable consideration.

The third case, *Post Publishing Co. v. Murray*, 230 Fed. 773 (C.A. 1), *cert. den.*, 241 U.S. 675, is the only one at all in point. It involved a scheme where a newspaper published headless photographs of women shoppers, who might, upon identifying themselves, come to the newspaper and receive \$5. The court somewhat casually dismissed the scheme as playful. It found little or no chance, and no intent to induce members of the public into buying anything, which it stated to be the critical element, although the circulation of the paper might be increased. Obviously the schemes to which the Commission's rules apply are designed to induce the giveaway program listeners to buy the products advertised over those programs.

That the claimed overwhelming unanimity of authority is actually overwhelming disparity in the approach of different courts to the problem is readily apparent. Appellees apparently base their insistence that consideration must be a paid "price" upon the

⁸In the scheme there considered some prizes consisted of merchandise for which no money had to be paid; other prizes consisted of a voucher entitling the winner to purchase a piano at a discount. No one paid any money or other valuable consideration for the chance to win either type of prize.

theory, unsupported by any citation of legislative history, that the sole evil Congress intended to prevent in 18 U.S.C. 1304 is the improvidence and impoverishment of the public which a lottery may cause. A leading decision of this Court effectively precludes that argument. *Horner v. United States*, 147 U.S. 449, concerned the application of a similar Federal statute to the sale of bonds by the Austrian Government. The bonds were accompanied by a ticket entitling the holder to a chance in a drawing for the distribution of large sums in addition to the amount called for by the bond itself. No question was raised that the bonds were worth less than the price paid nor that financial loss was induced by the chance to win a prize. This Court found the scheme to be an illegal lottery, despite the absence of any element of impoverishment or improvidence. The argument had been made that there could be no lottery because there could be no final loss and the money ventured must all come back. This Court quoted with approval (147 U.S. at 462) the rejection of this argument in *Ballock v. State*, 73 Md. 1, a case concerning the same bonds. The *Horner* case shows that the gambling spirit engendered, and the unjust enrichment of the promoter, both of which result from schemes *apparently* offering something for nothing to the lucky winner, are major elements of evil in a lottery enterprise.

A number of courts in well-reasoned opinions have recognized the necessity of cutting through form to see if a reward is being reaped through the lure of "something for nothing" from those actually furnishing a real consideration. As did Judge Clark, they have affirmatively rejected the uncritical requirement of a pecu-

niary payment, and applied a test of real benefit to the promoter. These courts have realistically drawn a distinction, as did the Commission in its lottery rules, between the distribution of prizes as a pure gift and illegal schemes for profit which feed upon the gambling instinct. See, *e.g.*, *Furst v. A. and G Amusement Co.*, 128 N.J.L. 311, 313-314, 25 A. 2d 892, 893; *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A. 2d 257; *State v. Wilson*, 109 Vt. 349, 196 Atl. 757. The following analysis of "Bank Night" in the *Waller* case is peculiarly appropriate here:

Motion picture theatres are not charitable enterprises. In holding out offers of an award of the kind and in the manner disclosed by the contract, they are not moved by a spirit of brotherly love, sympathy for the poor to the end that they may enjoy a more abundant life, or warmth of heart in any degree. With them it is a cold-blooded business device, embraced with hope and expectancy of filling their theatres with paying patrons. They proceed upon the notorious fact that there is nascent in the human breast a gambling instinct; that the average human is avid of an opportunity to gain much at a small risk; and that this instinct and passion is likely to blossom upon slight nourishment. (5 A. 2d at 260).

Another holding clearly *contra* to that below is contained in *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242, where a scheme for giving an automobile by chance to one of the persons present at a real estate auction was held to be a lottery. The court said:

The object of the defendant unquestionably was to attract persons to the auction sale with the hope

of deriving benefit from the crowd so augmented. Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal. (161 S.E. at 244.)

The same practical recognition of the advantage received by the promoter who seeks a greater sale of advertised goods or increased patronage at a place of business, whether or not the payment of a "price" is necessary to qualify for a prize, is present in *State v. Jones*, 44 N.M. 623, 107 P. 2d 324; and *Affiliated Enterprises, Inc. v. Gantz*, 86 F. 2d 597 (C.A. 10). As was said in *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579 (C.C.E.D.N.Y.), a suit to restrain the Postmaster from refusing to accept a newspaper as second class mail,

The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get some-

thing for nothing, are amply sufficient as a motive.
[Emphasis added.] (Pp. 581-582.)

III

We believe that the foregoing discussion clearly shows that these appeals should not be disposed of summarily. It should also be stressed that the issue here is one of significant concern to the Commission in its administration of the Communications Act, to broadcasters throughout the United States, and to many of the millions of persons who regularly listen to radio and television programs. The Commission has a clear-cut duty to deny licenses to those who regularly violate or propose to violate statutes with respect to broadcasting. Because of the widespread prevalence of giveaway programs⁹ and because of uncertainties existing in the lottery law on this subject, the Commission undertook to formulate its interpretation of the law for the guidance of its licensees. This had the effect of placing the industry upon notice as to the types of programs deemed unlawful, and permitted the kind of orderly challenge to the Commission's rules which has taken place in the present litigation.

The clear cut issue which that litigation presents should be authoritatively settled by this Court. The future in the absence of a definitive ruling by this Court

⁹ Appellee American Broadcasting Company suggests that giveaways do not constitute a serious problem at the present time, and it may be that the appellee networks do not today broadcast as many giveaway programs as they carried when the Commission's rules were promulgated. But this type of program is one of cyclical popularity. Moreover, the relative dearth of such programs at present is no doubt largely the result of the doubt as to their legality raised by the present case.

was foreseen by Judge Clark when he said in his dissent (110 F. Supp. at 394):

I think it therefore appropriate to reiterate by way of summary that my colleagues suggest no workable dividing line between what is "value" and what is not in deciding what the participants in these give-away schemes have themselves given. On the contrary, they seem to me to have rejected the understandable tests to which persuasive precedents point. I fear, therefore, that our decision will serve to promote more confusion than it allays.

CONCLUSION

It is respectfully submitted that these appeals raise a substantial issue of law, and that the prayers of appellees for affirmance, without argument, of the final judgment of the district court should therefore be denied.

✓ RICHARD A. SOLOMON,
Acting General Counsel,
 ✓ J. ROGER WOLLENBERG,
Assistant General Counsel,
 ✓ DANIEL R. OHLBAUM,
Counsel.

Federal Communications Commission.

JUNE 15, 1953.

APPENDIX

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 9113

In the Matter of Promulgation of Rules Governing
Broadcast of Lottery Information

REPORT AND ORDER

By the Commission: (Commissioners Coy, Chairman;
Hyde and Jones not participating; Commissioner
Hennock dissenting).

The Commission has this day determined to adopt the attached interpretative rules, set forth in the appendix to this Report, to be designated as Sections 3.192, 3.292, and 3.692. These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U S C 1304), prohibiting the broadcast of any lottery, gift enterprise, or similar scheme, which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest. A Notice of Proposed Rule Making concerning this subject was issued by the Commission on August 5, 1948 and a Supplemental Notice of Proposed Rule Making was issued on August 27, 1948. Interested parties were afforded an opportunity to file briefs or statements setting forth why they believe the rules should or should not be adopted and oral argument on the matter was held before the Commission *en banc* on October 19, 1948.

Two major objections have been raised to the adoption of the proposed rules. In the first place, it is alleged that the Commission is not authorized by law to promulgate Rules or Regulations setting forth the type of programs the broadcast of which the Commission believes to be within the scope of the prohibition of Section 1304 of the Criminal Code and, therefore, contrary to the public interest. It has also been argued that even if the Commission possesses such rule-making authority, the particular rules proposed by the Commission do not, as a matter of substantive law, set forth violations of Section 1304. After careful consideration of these contentions, we have concluded, for the reasons set out below, that they are without merit and that the Rules should be adopted.

I

On the question of jurisdiction to promulgate the rules, we are able to reach the conclusions that the status of the prohibition on the broadcasting of lottery, gift enterprise, and similar schemes as a provision of the Criminal Code does not affect the fact that it is an important declaration of public policy by Congress in the broadcast field; that the Commission is under a duty to give effect to such public policy in its licensing functions; that this duty must be performed even where other agencies or the courts have concurrent powers which have not been exercised in the particular case before the Commission; that the Commission may in the exercise of authority under Section 4(i) and 303(r) of the Communications Act, set out in interpretative rules for the information and guidance of licensees and other interested persons, its interpretation of a statute, expressing public policy in the broadcast field and,

therefore, an aspect of the standard of the public interest to be applied in licensing proceedings under Sections 307, 308, and 309 of the Communications Act; and that the issuance of such interpretative rules is in accordance with the provisions of the Administrative Procedure Act.

Section 1304 is itself a criminal provision making the broadcast of any lottery, gift enterprise or similar scheme by any broadcast licensee punishable by fine, imprisonment or both. It does not differ in this respect from the former Section 316 of the Communications Act which carried its own express penal sanctions. The reenactment of the substance of Section 316 of the Communications Act as Section 1304 of the Criminal Code on July 25, 1948, by Public Law 772, 80th Congress, 2nd Session, as part of a general recodification of the criminal law was not intended to affect, and did not in any way affect or change the impact of the prohibition against the broadcast of lottery information as a criminal prohibition expressing the public policy of the United States against the broadcasting of such programs. Both Section 1304 and the former Section 316 impose a duty upon the Department of Justice to prosecute apparent violations of the prohibition coming to its attention and, similarly, impose an obligation upon this Commission, as the agency of the federal government most closely in touch with the day-to-day operation of radio broadcasting, to refer those violations of the Section which come to its attention to the Department of Justice for appropriate action. It has been suggested that such periodic reference to the Department of Justice of apparent violations of law is the only obligation imposed upon this Commission, but this is clearly not so. Violation of any provision of law by a broadcast licensee or prospective licensee

obviously is relevant to a determination as to whether such person has the requisite character qualifications of a licensee and to operate a station in the public interest. *Mester Brothers v. United States*, 70 F. Supp. 118, *affirmed*, 332 U.S. 749; see *Southern Steamship Company v. National Labor Relations Board*, 316 U. S. 31. This is especially true when the law involved deals directly with broadcasting and expresses a public policy so clear and strong that violation is made a criminal offense.

It is equally clear that the Commission may consider any violation of the prohibition against the broadcast of lottery information whether or not there has been a prior judicial determination in the particular case. *National Broadcasting Company v. United States*, 319 U.S. 190; *Southern Steamship Company v. National Labor Relations Board*, 316 U.S. 31, *Cf.*, *Public Clearing House v. Coyne*, 194 U.S. 487. As the Supreme Court pointed out in the *Southern Steamship* case, *supra*, at pp. 46-47, the respective administrative agencies have an individual responsibility for giving effect to the public policy of the nation expressed in statutes other than their own, which cannot be avoided or postponed until some other agency or branch of the government, which may also have a responsibility arising out of the same legislative mandate, has acted.¹ In the

¹ In the course of the legal attack upon the Commission's Chain Broadcast rules a similar claim was made that the Commission could not consider activities which might possibly constitute unconvicted violations of the antitrust laws since, under Section 311 of the Communications Act, it was authorized to refuse a license to any person who had been found guilty of violating these laws. In rejecting this argument and upholding the right of the Commission to promulgate its rules the Supreme Court stated: (*National Broadcasting Company v. United States*, 319 U.S. 223)

A licensee charged with practices in contravention of this standard [public interest, convenience or necessity] cannot con-

present case, the relevant facts so far as the Commission is concerned, are that Congress in its enactment of Section 1304 and its predecessor, Section 316 of the Communications Act, has clearly determined that broadcasts of lotteries, gift enterprises, or similar schemes are not in the public interest; the additional determination that the carrying of such broadcasts may subject the offender to imprisonment or payment of fine does not in any way limit the Commission's responsibility to give heed to the explicit Congressional declaration as to the public interest in the broadcast field.

It has been argued that, whatever power the Commission might have to consider violations of the provisions of Section 1304 on a case-to-case basis, it may not adopt general rules setting out in advance for the information of licensees the course of action it intends to pursue. In our opinion, the determination to issue interpretative rules rather than to enunciate its views from case-to-case is not only proper but, under the circumstances, the only reasonable course for us to have taken. It should be made clear that these rules are not intended to require any licensee to refrain from taking any action which is not already forbidden by statute. They merely set forth, to the extent that any general statement is possible, the Commission's interpretation of the existing Congressional mandate with respect to broadcasts of lotteries, gift enterprises, and

tinue to hold his license merely because his conduct is also in violation of the antitrust laws and he has not yet been proceeded against and convicted . . . Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest" merely because its misconduct happened to be an unconvicted violation of the antitrust laws.

similar schemes. As such, they will provide licensees with information by which they may better determine, in advance of Commission action in licensing proceedings, the interpretation of the law which the Commission will follow in determining the legality of particular programs in licensing proceedings.

In view of the almost infinite variety of program format details possible in connection with "give away" schemes, interpretation of the statute solely on a case-to-case basis may readily leave licensees in deep confusion as to the applicability of the statute in situations other than the precise scheme involved in a particular case. But despite the variety of possible details, a number of common recurrent features, which embody the elements at which the statute is aimed, can be identified in order to clarify the application of the statute in particular situations. Announcement of interpretative rules in an area where the details may obscure the more general principles which are readily identified, thus serves both to diminish the perils of uncertainty and to remove the refuge of the opinion of counsel, which may vary not only with different cases, but with different counsel. Just as the licensee is entitled to come before the Commission and state that he relied on the opinion of counsel in determining what was illegal and contrary to the public interest, so the Commission may afford the licensee guidance by stating what it believes the law to be in the form of interpretative rules.

Since any such interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret, *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140, adoption

of the rules may make available to persons who may have property interests directly and immediately affected adversely by their adoption an opportunity to secure a judicial determination of the validity of any such application of the rules in advance of Commission action in licensing proceedings and without the expense, delay in time and licensee jeopardy which would be involved if the Commission's interpretation of the law were to be developed and disclosed only in the course of such proceedings. *Cf. Columbia Broadcasting System v. United States*, 316 U.S. 407.

Sections 4(i) and 303(r) of the Communications Act expressly authorize the Commission to make such rules and regulations, not inconsistent with "this Act" or "law", as may be necessary either "in the execution of its (Commission's) functions", or "to carry out the provisions of this Act." The claim that in spite of these provisions the Commission, in the exercise of its licensing functions must announce applicable principles of law only on a case-to-case basis and may not issue general rules setting forth its understanding of the applicable law to be applied to recurring general problems of interest and importance to all licensees and applicants, has been expressly rejected by the courts. See *National Broadcasting Company v. United States*, 319 U.S. 190 affirming 47 F. Supp. 940; *Columbia Broadcasting System v. United States*, 316 U.S. 407, 420-421; *Heitmeyer v. Federal Communications Commission*, 68 App. D.C. 180, 95 F. 2d 91; *Ward v. Federal Communications Commission*, 71 App. D.C. 166, 108 F. 2d 486; *Cf. Stahlman v. Federal Communications Commission*, 75 App. D.C. 176, 126 F. 2d 124; *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194; *Lichter v. United States*, 334 U.S. 742. As Judge

Learned Hand stated for the District Court in the *National Broadcasting* case, *supra*, (47 F. Supp. 945):

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future.

These considerations are applicable with even greater force where the administrative agency is not promulgating rules which constitute an exercise of delegated authority to forbid or require specified conduct on the basis of findings as to the public interest in the particular field, as in the *National Broadcasting Company* case, *supra*, but is rather issuing interpretative rules for the purpose of stating its understanding of what Congress itself has found to be contrary to the public interest and has itself forbidden.

What we have said above disposes of the claim that the adoption of these rules would be in violation of Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 1009 which provides that "no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law." As the legislative history of the provision makes clear, Section 9(a) was not intended to prohibit the issuance of any rules which an agency would otherwise be authorized to issue but was merely designed to "afford statutory recognition for the basic rule of law embodied in judicial decisions." *Senate*

Judiciary Committee Print, June 1945, in *Sen. Doc. No. 248*, 79th Cong. 2d Sess. p. 34. See also *Sen. Doc. No. 248*, p. 229 (*Attorney General's Interpretation*). And both the Senate and House Reports on the bills, which became the Administrative Procedure Act, made clear that Section 9(a) was intended to prevent agencies from imposing types of sanctions which they had not been specifically or generally authorized to impose. Thus, if the Commission had not been given authority by Sections 4(i) and 303(r) to issue such general rules and regulations as might be necessary in the performance of its duties, and if sections 307, 308, and 309 of the Communications Act did not authorize the Commission to consider relevant aspects of the public interest in licensing proceedings, Section 9(a) of the Administrative Procedure Act would have prevented the Commission from assuming such rule-making power just as it prevents the Commission from issuing cease and desist orders in the absence of authority to do so. See Senate Report on S. 7 in *Sen. Doc. 248*, 79th Cong. 2d Sess. p. 211 and House Report on S. 7 in *Sen. Doc. 248*, 79th Cong. 2d Sess. p. 274. While the Senate Report, *supra*, makes clear that Section 9(a) of the Administrative Procedure Act prohibits one agency from exercising the functions of another, these rules, as indicated above, are not an enforcement of the Department of Justice's authority to prosecute violations of Section 1304 of the Criminal Code, but an aid to the exercise of the Commission's independent jurisdiction and authority to license applicants for station licenses when, and only when, the grant of such application would serve the public interest, convenience, or necessity.

II

After examination of the arguments presented, the Commission is convinced that the features of programs covered by the proposed rules come within the scope of the language "lotteries, gift enterprises, or similar schemes dependent in whole or part on lot or chance" set forth in Section 1304 of the Criminal Code. For the purposes of considering whether the rules before us are a proper interpretation of the statute, it is unnecessary to resolve the question of the extent to which the statutory terms "gift enterprises or similar scheme" may include more than the statutory term "lotteries". For, in interpreting the statute we conclude that the statutory term "lottery" includes more than the popular conception of "lottery" in which the opportunity of participating in the selection of a winner of prizes is itself purchased and paid for in cash. This view is borne out by the case of *Horner v. United States*, 147 U.S. 449. Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area.²

² It must be recognized that the statute itself does not prescribe the element of consideration. The statute itself therefore leaves open the view that any scheme containing the characteristics of "offering prizes dependent in whole or in part on lot or chance" is within the scope of its prohibition, and that the language "similar scheme" refers to the common possession of these characteristics and is not intended to limit the application of the statute to such schemes as are found to possess all the elements of lotteries, in addition to those aspects of lotteries which are identical with the characteristics which are in terms described in the statute. However, we leave this question open, for we do not now intend to foreclose by these interpretative rules a judicial conclusion that we have not

The element of "prize" raises no substantial problem—all of the program schemes described in the rules involve the distribution of money or other valuable prizes. There is similarly no serious question concerning the element of chance. While there are many bona fide contests open to all in which the element of skill is primarily determinative of the winner or winners of the prizes which the statute does not forbid, in each of the cases set forth in the attached rules the element of chance determines in whole or in part the identity of the persons to whom the prize is to be awarded.

The only substantial issue presented is whether such programs also involve the element of "consideration", assuming it to be a necessary element of schemes forbidden by the statute. We think that in each of the instances specified by the rules, consideration of some form is present. While only category "1" requires a prospective winner to have directly contributed money or purchased goods as a condition of success, it has been clear ever since the decision of the Supreme Court in *Horner v. United States*, 147 U.S. 449 (1893) that no such restricted definition of the term "consideration" is applicable to the problem and that a scheme may come within the scope of the statutory prohibition, which offers prizes dependent upon lot or chance even where the participants in the schemes are not risking the loss of any money through their participation.

In determining whether the element of consideration is present in any radio "giveaway" schemes, we must consider the problem in context of the unique nature

covered as many situations as the language and intent of the statute extend to. We believe that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or whether it be more broadly read.

of the medium of radio. Unlike the motion pictures and theatre, no charge is made by the licensee to members of the public for access to any programs. Nor, as in the case of newspapers and magazines, must a copy of a publication be purchased to secure the information, entertainment and advertising presented. Section 3(o) of the Communications Act defines "Broadcasting" as "the dissemination of radio communications intended to be received by the public . . ." Most licensees support their operations by the sale of time to advertisers who seek to reach the public.³ We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create "circulation" as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or service.⁴ In this context, pre-occupation with such forms of furnishing of consideration to the advertiser, by such means as the purchase of his product or the furnishing of box tops as a condition precedent to participation in a scheme may obscure the valuable benefit furnished to the licensee in the form of "circulation" when the listener is induced by a scheme for the awarding of prizes based

³ *Public Service Responsibility of Broadcast Licensees*, 40-41.

⁴ In the opinion of the Supreme Court in *Federal Communications Commission v. Sanders Brothers*, 309 U.S. 470, Mr. Justice Roberts observed:

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

on chance to listen to a particular station and program. Cf. *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581-582 (C.C. E.D. N.Y.). Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and "circulation" to the sponsor, and to the sponsor as well, who presents his advertising to the audience secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen. Any supposition that there must be a direct sale or other form of contract before a scheme involving some form of consideration is presented does not take into account the nature of the medium of broadcasting and its economics. We do not believe that Congress in announcing a public policy particularly applicable to the field of broadcasting intended only to proscribe schemes designed for other media such as direct solicitation or publications, and intended that the relevant legal analysis should not take into account the nature of the medium of radio.

ACCORDINGLY, IT IS ORDERED this 18th day of August, 1949, that Sections 3.192, 3.292 and 3.692 as set forth in the attached appendix be adopted effective October 1, 1949.

BY DIRECTION OF THE COMMISSION,
T. J. SLOWIE,
Secretary.

Attach.

Released: August 19, 1949.

Appendix

The following is the text of Sections 3.192, 3.292 and 3.692

Lotteries and Give-Away Programs—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting “the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.” (See 18 U.S.C. § 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

DISSENTING VIEWS OF COMMISSIONER HENNOCK

I believe that the Proposed Rules should not be adopted. These rules purport to interpret for the benefit of broadcast licensees Section 1304 of the Criminal Code which prohibits, with criminal sanction, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance."

The concept of "lottery" has a long legal history. This provision, or one similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the

term "lottery" is novel in at least one respect. This is the first instance in which a scheme has been called a lottery when the sole consideration supporting it is nominal or other than the payment of something of value. Even in the "Bank Night" cases, *e.g.*, *Commonwealth v. Lund*, 15 A. (2d) 839, although particular individuals were allowed to participate without the purchase of a ticket or the payment of any valuable consideration, such consideration was paid by the great mass of the participants. Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. If the so-called "giveaway" programs, at which these Rules are ostensibly directed are, in fact, in violation of Section 1304, I believe this should be determined by a court after proper evaluation in a particular case. Since the lottery prohibition which was formerly Section 316 of the Communications Act of 1934, as amended, has been deleted from the Act which sets forth the duties and powers of this agency, I feel that, without a specific mandate from Congress for us to curb the prevalence of this type of program, our action today is unwarranted. For this reason, I suggest that the matter be brought to the attention of the Congress and of the Department of Justice for any action which they may deem appropriate to have taken.

Excerpt from Postal Bulletin No. 19642, of June 4, 1953

INSTRUCTIONS OF THE SOLICITOR

RULINGS ON LOTTERIES, GIFT ENTERPRISES, ETC.

In the Postal Bulletin of February 13, 1947, the following statement was made of the position of the Office of the Solicitor respecting the element of consideration in a lottery:

“In order for a prize scheme to be held in violation of this section (36.6, P. L. & R., 1948), it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the ‘consideration’ involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one’s name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.”

There have been two recent decisions in the Federal courts dealing with the question of consideration in a lottery: *Garden City Chamber of Commerce v. Wagner*, 100 Fed. Supp. 769, wherein it was held that a requirement that participant visit a number of stores to determine if his number is posted in one of the store windows, thereby entitling him to a prize, does not constitute a consideration for a prize, and that such a scheme is therefore not a lottery; *American Broadcasting Co., Inc., et al. v. Federal Communications Commission*, 110 Fed. Supp. 374, dealing principally with requirements of listening to the radio or watching television programs.

This office will continue to hold that the element of consideration is present in a prize scheme when a substantial expenditure of time and effort is involved. However, in view of the court decisions referred to, this office must reverse its rulings which have held consideration to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc.

Postmasters should therefore exercise caution in applying previous rulings of this office in prize plans involving consideration only in "time and effort" expended. If there is doubt with respect to any of these questions, the matter should be submitted to the Solicitor so that a definite ruling may be made thereon.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statute involved.....	3
Statement.....	3
A. The proceedings before the Commission.....	7
B. The decision below.....	12
Specification of errors to be urged.....	17
Summary of argument.....	18
Argument.....	19
Where a prize awarded in whole or in part by chance is not a gift, but is given in return for required acts which are calculated to be of financial gain to the promoter, there is a lottery or similar scheme within 18 U. S. C. 1304....	19
Introduction.....	19
A. The background and scope of 18 U. S. C. 1304.....	27
B. The ingredient of consideration in the schemes out- lawed under the Commission's rules.....	47
Conclusion.....	65
Appendix A—State anti-lottery provisions.....	66
Appendix B—Decisions of state courts on the legality of Bank Night type schemes.....	72
Appendix C—Postal Bulletin No. 19642 excerpt.....	76

CITATIONS

Cases:

<i>Affiliated Enterprises, Inc. v. Gantz</i> , 86 F. 2d 597.....	49
<i>Affiliated Enterprises, Inc. v. Gruber</i> , 86 F. 2d 958.....	58
<i>Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.</i> , 23 F. Supp. 3.....	58
<i>Affiliated Enterprises, Inc. v. Waller</i> , 40 Del. 28, 5 A. 2d 257.....	49, 72
<i>Albert Lea Amusement Corp. v. Hanson</i> , 231 Minn. 401, 43 N. W. 2d 249.....	57, 74
<i>Ballock v. State</i> , 73 Md. 1.....	38
<i>Barker v. State</i> , 56 Ga. App. 705, 193 S. E. 605.....	44, 72
<i>Bartlett v. Parker</i> , (1912) 2 K. B. 497.....	42
<i>Bell v. The State</i> , 37 Tenn. (5 Sneed.) 507.....	40, 56-7
<i>Blair v. Lowham</i> , 73 Utah 599, 276 P. 292.....	52
<i>Brooklyn Daily Eagle v. Voorhies</i> , 181 Fed. 579.....	51
<i>Bucklew v. The State</i> , 62 Ala. 334.....	57
<i>Central States Theatre Corp. v. Patz</i> , 11 F. Supp. 566.....	39, 44
<i>Chancy Park Land Co. v. Hart</i> , 104 Iowa 592, 73 N. W. 1059.....	58

II

Cases—Continued

	Page
<i>City of Roswell v. Jones</i> , 41 N. M. 258, 67 P. 2d 286.....	49
<i>City of Wink v. Griffith Amusement Co.</i> , 129 Tex. 40, 100 S. W. 2d 695.....	73
<i>Cohens v. Virginia</i> , 19 U. S. (6 Wheat.) 264.....	29
<i>Cole v. State</i> , 133 Tex. Cr. R. 548, 112 S. W. 2d 725.....	73
<i>Commonwealth v. Hefner</i> , 304 Mass. 521, 24 N. E. 2d 508.....	72
<i>Commonwealth v. Lund</i> , 142 Pa. Super. 208, 15 A. 2d 839, allocatur refused, 142 Pa. Super. xxxi.....	44, 73
<i>Commonwealth v. McLaughlin</i> , 307 Mass. 230, 29 N. E. 2d 821.....	72
<i>Commonwealth v. Wall</i> , 295 Mass. 70, 3 N. E. 2d 28.....	55, 58, 72
<i>Consolidated Mfg. Co. v. Federal Trade Commission</i> , 199 F. 2d 417.....	45-6
<i>Corporate Organization & Audit Co. v. Hodges</i> , 47 App. D. C. 460.....	41
<i>Cross v. The People</i> , 18 Colo. 321.....	58, 59
<i>Darlington Theatres v. Coker</i> , 190 S. C. 282, 2 S. E. 2d 782..	55, 75
<i>Donaldson v. Read Magazine</i> , 333 U. S. 178.....	13
<i>Dorman v. Publiz-Saenger-Sparks Theatres, Inc.</i> , 135 Fla. 284, 184 So. 886.....	74
<i>Dunn v. The People</i> , 40 Ill. 465.....	42
<i>Equitable Loan & Security Co. v. Waring</i> , 117 Ga. 599, 44 S. E. 320.....	60
<i>Federal Communications Commission v. Pottsville Broadcasting Co.</i> , 309 U. S. 134.....	13
<i>Federal Communications Commission v. Sanders Radio Station</i> , 309 U. S. 470.....	26
<i>Federal Communications Commission v. WOKO, Inc.</i> , 329 U. S. 223.....	13
<i>Federal Trade Commission v. Keppel & Bro.</i> , 291 U. S. 304.....	45, 61
<i>Furst v. A. & G. Amusement Co.</i> , 128 N. J. L. 311, 25 A. 2d 892.....	39, 49-50, 73
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, 192 F. 2d 240, 104 F. Supp. 235.....	54, 63
<i>Glover v. Molloska</i> , 238 Mich. 216, 213 N. W. 107; 242 Mich. 34.....	52
<i>Gooch v. United States</i> , 297 U. S. 124.....	64
<i>Governors v. Art Union</i> , 7 N. Y. 228.....	56
<i>Griffith Amusement Co. v. Morgan</i> , 98 S. W. 2d 844 (Tex. Civ App.).....	55, 58, 75
<i>Grimes v. State</i> , 235 Ala. 192, 178 So. 73.....	44, 60, 72
<i>Hall v. McWilliam</i> (1901), 85 L. T. 239.....	41-2
<i>Hofeller v. Federal Trade Commission</i> , 82 F. 2d 647, cert. den., 299 U. S. 557.....	45
<i>Horner v. United States</i> , 147 U. S. 449.....	13, 19, 37-39, 40, 47
<i>Hull v. Ruggles</i> , 56 N. Y. 424.....	58
<i>Hunt v. Williams</i> , (1888) 52 J. P. 821.....	42
<i>In re Rapier</i> , 143 U. S. 110.....	13

III

Cases—Continued

	Page
<i>Iris Amusement Corp. v. Kelly</i> , 366 Ill. 256, 8 N. E. 2d 648.....	44, 60, 72
<i>Johnston Broadcasting Co. v. Federal Communications Commission</i> , 175 F. 2d 351.....	13
<i>Jolovitz v. Redington & Co.</i> , 88 A. 2d 589.....	41
<i>Jorman v. State</i> , 54 Ga. App. 738, 188 S. E. 925.....	72
<i>Kessler v. Schreiber</i> , 39 F. Supp. 655.....	49
<i>Knox Industries Corp. v. State ex rel. Scanland</i> , 258 P. 2d 910.....	51-2
<i>Kordel v. United States</i> , 335 U. S. 345.....	64
<i>Leonard v. Pennypacker</i> , 85 N. J. L. 333, 89 A. 26.....	41
<i>Little River Theatre Corp. v. State ex rel. Hodge</i> , 135 Fla. 854, 185 So. 855.....	72, 74
<i>McFadden v. Bain</i> , 162 Ore. 250, 91 P. 2d 292.....	73
<i>Market Plumbing & Heating Co. v. Spangenberg</i> , 112 N. J. L. 46, 169 Atl. 660, affd., 114 N. J. L. 271, 176 A. 342.....	41
<i>Matter of Gregory</i> , 219 U. S. 210.....	40, 46
<i>Maughs v. Porter</i> , 157 Va. 415, 161 S. E. 242.....	51-2
<i>Mester v. United States</i> , 70 F. Supp. 118, affd., 332 U. S. 749.....	13
<i>Minter v. Federal Trade Commission</i> , 102 F. 2d 69.....	40
<i>Modernistic Candies v. Federal Trade Commission</i> , 145 F. 2d 454.....	45
<i>National Broadcasting Company, Inc. v. United States</i> , 319 U. S. 190.....	13
<i>Northern Securities Co. v. United States</i> , 193 U. S. 197.....	64
<i>Northern Virginia Broadcasters, Inc.</i> , 4 Pike & Fischer, R. R. 660, 662.....	8, 11
<i>People v. Burns</i> , 304 N. Y. 380, 107 N. E. 2d 498.....	55
<i>People v. Cardas</i> , 137 Cal. App. 788, 28 P. 2d 99.....	55, 58, 74
<i>People v. Mail & Express Co.</i> , 179 N. Y. S. 640, affd. 231 N. Y. 586, 132 N. E. 898.....	58
<i>People v. Miller</i> , 271 N. Y. 44, 2 N. E. 2d 38.....	55, 73, 75
<i>People v. Shafer</i> , 160 Misc. 174, 289 N. Y. Supp. 649, affd., 273 N. Y. 475, 6 N. E. 2d 410.....	55, 58, 74
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773, cert. den., 241 U. S. 675.....	58
<i>Rast v. Van Deman & Lewis</i> , 240 U. S. 342.....	46
<i>Regents of Georgia v. Carroll</i> , 338 U. S. 586.....	13
<i>Rountree v. Ingle</i> , 94 S. C. 231, 77 S. E. 931.....	40
<i>St. Peter v. Pioneer Theatre Corp.</i> , 227 Iowa 1391, 291 N. W. 164.....	74
<i>Seidenbender v. Charles</i> , 4 Sergeant & Rawle 151, 8 Am. Dec. 682.....	40, 61
<i>Shanchell v. Lewis Amusement Co.</i> , 171 So. 426.....	72
<i>Simmons v. Randforce Amusement Corp.</i> , 162 Misc. 491, 293 N. Y. S. 745.....	75
<i>Society Theatre v. Seattle</i> , 118 Wash. 258, 203 Pac. 21.....	74

IV

Cases—Continued

	Page
<i>Southern S. S. Co. v. Labor Board</i> , 316 U. S. 31.....	13
<i>Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.</i> , 276 Mich. 127, 267 N. W. 602.....	43, 73
<i>Stahlman v. Federal Communications Commission</i> , 126 F. 2d 124.....	13
<i>Standridge v. Williford-Burns-Rice Co.</i> , 148 Ga. 283, 96 S. E. 498.....	41
<i>State v. Bader</i> , 24 O. N. P. (N. S.) 186, affd., 21 Ohio L. R. 293.....	52
<i>State v. Big Chief Corp.</i> , 64 R. I. 448, 13 A. 2d 236.....	55, 75
<i>State v. Clarke</i> , 33 N. H. 329, 66 Am. Dec. 723.....	56
<i>State v. Danz</i> , 140 Wash. 546, 250 Pac. 37.....	74
<i>State v. Dorau</i> , 124 Conn. 160, 198 Atl. 573.....	39, 72
<i>State v. Eames</i> , 87 N. H. 477, 183 Atl. 590.....	57-8, 74
<i>State v. Greater Huntington Theatre Corp.</i> , 133 W. Va. 252, 55 S. E. 2d 681.....	44, 74
<i>State v. Hundling</i> , 220 Iowa 1369, 264 N. W. 608....	57, 58, 59, 74
<i>State v. Jones</i> , 44 N. M. 623, 107 P. 2d 324.....	49, 73
<i>State v. Lipkin</i> , 169 N. C. 265, 84 S. E. 340.....	60
<i>State v. Mabrey</i> , 56 N. W. 2d 888.....	57
<i>State v. McEwan</i> , 343 Mo. 213, 120 S. W. 2d 1098..	39, 44, 49, 73
<i>State v. Robb & Rowley United</i> , 118 S. W. 2d 917 (Tex. Civ. App.).....	73
<i>State v. Schubert Theatre Players Co.</i> , 203 Minn. 366, 281 N. W. 369.....	73, 74
<i>State v. Shorts and Tilney</i> , 32 N. J. L. 398, 90 Am. Dec. 668..	42
<i>State v. Wilson</i> , 109 Vt. 349, 196 Atl. 757.....	17, 49, 74
<i>State ex. Inf. McKittrick v. Globe-Democrat Publ. Co.</i> , 110 S. W. 2d 705.....	39
<i>State ex rel. Beck v. Fox Kansas Theatre Co.</i> , 144 Kan. 687, 62 P. 2d 929.....	49, 55, 72
<i>State ex rel. Cowie v. La Crosse Theaters Co.</i> , 232 Wis. 153, 286 N. W. 707.....	74
<i>State ex rel. District Atty. v. Crescent Amusement Co.</i> , 170 Tenn. 351, 95 S. W. 2d 310.....	75
<i>State ex rel. Draper v. Lynch</i> , 192 Okla. 497, 137 P. 2d 949..	44, 59, 73
<i>State ex rel. Dussault v. Fox Missoula Theatre Corp.</i> , 110 Mont. 441, 101 P. 2d 1065.....	73
<i>State ex rel. Evans v. Brotherhood of Friends</i> , 41 Wash. 2d 133, 247 P. 2d 787.....	61
<i>State ex rel. Hunter v. Fox Beatrice Theatre Corp.</i> , 133 Neb. 392, 275 N. W. 605.....	39, 44, 49, 73
<i>State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn.</i> , 139 Neb. 312, 297 N. W. 547.....	44, 60, 73
<i>State ex rel. Regez v. Blumer</i> , 236 Wis. 129, 294 N. W. 491..	51-2
<i>State ex rel. Stafford v. Fox-Great Falls Theatre Corp.</i> , 114 Mont. 52, 132 P. 2d 689.....	55

Cases—Continued

	Page
<i>Stern v. Miner</i> , 239 Wis. 41, 300 N. W. 738.....	74
<i>Stone v. Mississippi</i> , 101 U. S. 814.....	36
<i>Sweets Co. of America v. Federal Trade Commission</i> , 109 F. 2d 296.....	46
<i>Taylor v. Smetten</i> (1883) 11 Q. B. 207.....	41
<i>The People v. Sturdevant</i> , 23 Wend. 417 (N. Y.).....	32
<i>The State v. Mumford</i> , 73 Mo. 647.....	42
<i>Thomas v. The People</i> , 59 Ill. 160.....	40, 42
<i>Troy Amusement Co. v. Attenweiler</i> , 64 Ohio App. 105, 28 N. E. 2d 207, <i>affd.</i> 137 Ohio St. 460, 30 N. E. 2d 799... 39-40, 44, 49, 61, 73	
<i>Try-Me Bottling Co. v. State</i> , 235 Ala. 307, 178 So. 231....	41
<i>United-Detroit Theatres Corp. v. Colonial Theatrical Enter- prise, Inc.</i> , 280 Mich. 425, 273 N. W. 756.....	73
<i>United States v. Alpers</i> , 338 U. S. 680.....	64
<i>United States v. Halseth</i> , 342 U. S. 277.....	63
<i>United States v. Jefferson</i> , 134 F. 299.....	61
<i>United States v. One Box of Tobacco</i> , 190 Fed. 731.....	40
<i>Utz v. Wolf</i> , 72 Ind. A. 572, 126 N. E. 327.....	41
<i>Waite v. Press Publishing Assn.</i> , 155 Fed. 58.....	42
<i>Whitley v. McConnell</i> , 133 Ga. 738, 66 S. E. 933.....	40, 41
<i>Willis v. Young</i> , (1907) 1 K. B. 448.....	53
<i>Worden v. City of Louisville</i> , 279 Ky. 712, 131 S. W. 2d 923..	41
<i>WRBL Radio Station, Inc.</i> , 2 F. C. C. 687.....	7
<i>Yellow-Stone Kit v. State</i> , 88 Ala. 196, 7 So. 338.....	55-59

Statutes:

Constitution of the United States:

Article I, Section 9, Clause 3.....	14
Article III, Section 2, Clause 3.....	14
First Amendment.....	13
Fifth Amendment.....	13
Sixth Amendment.....	13-14

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C.

1001, *et seq.*:

Section 9 (a).....	12, 13
Section 10.....	5

Communications Act of 1934, 48 Stat. 1064, as amended,

47 U. S. C. 151 *et seq.*:

Section 4 (i).....	13
Section 303 (r).....	13
Section 307 (a).....	13
Section 308.....	13
Section 309 (a).....	13
Section 312.....	13
Former Section 316.....	7, 8, 9, 35, 36
Section 402 (a).....	5, 6

Communications Act Amendments, 1952, 66 Stat. 711.... 13

VI

Statutes—Continued

	Page
Title 18, U. S. Code:	
Section 1301.....	35
Section 1302.....	35
Section 1303.....	35
Section 1304.....	2, 3, 6, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 27, 35, 36, 37, 47, 59, 60, 61, 63, 64
Section 1305.....	36
Title 19, U. S. Code, Section 1305 (a).....	36
Title 28, U. S. Code:	
Section 1253.....	2
Section 1336.....	5
Section 1398.....	5
Section 2101 (b).....	2
Section 2284.....	5
Sections 2321-5.....	5
Title 39, U. S. Code:	
Section 259.....	35
Section 732.....	35
Title 48, U. S. Code:	
Section 77.....	35
Section 562.....	35
Act of March 2, 1827, section 6, 4 Stat. 238.....	33, 36
Act of July 27, 1868, section 13, 15 Stat. 194, 196.....	33
Act of June 8, 1872, 17 Stat. 283.....	34
Section 149, 17 Stat. 302.....	34
Section 300, 17 Stat. 322.....	34
Act of July 12, 1876, section 2, 19 Stat. 90.....	34
Act of September 19, 1890, 26 Stat. 465.....	34
Section 1, 26 Stat. 465.....	34
Section 2, 26 Stat. 466.....	34
Section 3, 26 Stat. 466.....	34
Act of March 2, 1895, 28 Stat. 963.....	34
Section 1, 28 Stat. 963.....	35
Section 4, 28 Stat. 964.....	34-35
Act of March 4, 1909, 35 Stat. 1088.....	35
Section 213, 35 Stat. 1129.....	35
Section 214, 35 Stat. 1130.....	35 60
Section 237, 35 Stat. 1136.....	35
Public Law 772, 80th Cong., 2d Sess., 62 Stat. 683.....	9
Public Law 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5	
U. S. C. 1031, <i>et seq.</i>	5
Section 14.....	6
Alabama Code 1923, Section 4247.....	59
English statutes:	
Unlawful Games Act, 33 Hen. 8, c. 9.....	30
10 Will. 3, c. 23.....	30, 31
Betting and Lotteries Act of 1934, 24 and 25 Geo.	
5 c. 58.....	30
Statute Law Revision Act, 14 Geo. 6 c. 6.....	30

VII

Miscellaneous:	Page
Ashton, A History of English Lotteries (1893).....	28
Extracts from Second Report of Select Committee on the Laws Relating to Lotteries (1808).....	31, 36
Final Report, Royal Commission on Lotteries and Betting (1933).....	28, 30, 31, 32
Gaming and Wagering, Vol. 10, Encyclopaedia Britannica.....	28
Halsbury, Laws of England (2d Ed.).....	42
Motion Picture "If I Had A Million" (Paramount Publix Corporation, 1932).....	22
Postal Bulletin No. 19642, June 4, 1953.....	63
Report of Committee of the House of Representatives of Pennsylvania on Lotteries (1832).....	32
S. Rep. 10, Part 1, on S. 2982, 60th Cong., 1st Sess.....	35, 60
Sixth Report and Order (Docket No. 8736, <i>et al.</i>).....	3
Spofford, Lotteries in American History (1892).....	28, 29
82 Congressional Globe, July 24, 1868, P. 4412.....	33
The Television Code of the National Association of Radio and Television Broadcasters (1952).....	21
Thomas, Lotteries, Frauds and Obscenity in the Mails (1903).....	28, 38-39, 62-3
Williams, Flexible-Participation Lotteries (1938).....	28, 49

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION**

OPINIONS BELOW

The Report and Order of the Federal Communications Commission adopting the rules in is-

(1)

sue (R. 161) and the rules (R. 169) appear at 14 F. R. 5429. The opinions of the United States District Court for the Southern District of New York (R. 110) are reported at 110 F. Supp. 374.

JURISDICTION

The judgments of the court below (Clark, J., dissenting) were entered on March 11, 1953 (R. 138, 238, 296). Petitions for appeal therefrom were filed on May 8, 1953, and were allowed on the same day (R. 140, 239, 298). On October 12, 1953, this Court noted probable jurisdiction and consolidated the cases for argument (R. 307). The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which prohibits the broadcast of lotteries, gift enterprises, and other similar schemes. The question presented on these appeals is:

Whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or in-

duced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTE INVOLVED

18 U. S. C. 1304 is set out at page 9, *infra*.

STATEMENT

The appellees, American Broadcasting Company, Inc. (ABC), National Broadcasting Company, Inc. (NBC), and Columbia Broadcasting System, Inc. (CBS), are the licensees of radio and television broadcast stations subject to regulation by the Federal Communications Commission. These actions were brought by them against the United States and the Federal Communications Commission to set aside the Report and Order of the Commission adopted August 18, 1949, and released August 19, 1949 (14 F. R. 5429; R. 161), which adopted rules pertaining to the broadcast of lotteries. Sections 3.192, 3.292 and 3.656¹ of the Commission's Rules and Regulations.

The rules, which are identically worded and apply, respectively, to commercial standard broadcast (AM), FM broadcast and television broadcast stations, provide:

(a) An application for construction permit, license, renewal of license, or any other

¹ Section 3.656 was originally Section 3.692. It was renumbered by the Commission's Sixth Report and Order in Docket No. 8736, et al., adopted April 11, 1952 (17 F. R. 3905).

authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See 18 U. S. C. § 1304.)

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellees brought the present actions in the court below, seeking a permanent injunction against their enforcement.² The district court granted a tem-

² The actions were brought under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321-5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009.

Public Law 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under

porary restraining order, after which the Commission issued an order, on September 21, 1949, suspending the effective date of the rules pending a final determination of the litigation. The cases were consolidated for hearing, and were heard by the district court upon motions for summary judgment by appellees (ABC, R. 90; NBC, R. 224; CBS, R. 282) and motions by the Government to dismiss the complaints or, in the alternative, for summary judgment (R. 90-91, 232-233, 290-292).³

The district court handed down its decision on February 5, 1953 (R. 110), sustaining the Commission's general authority to adopt rules of the character involved. And paragraphs (a), and (b) (1) of the rules were sustained as correct interpretations of 18 U. S. C. 1304. Subdivisions (2), (3), and (4) of paragraph (b) of the rules were held invalid.

Circuit Judge Clark dissented from that part of the decision setting aside subdivisions (2), (3), and (4) of paragraph (b).

Section 402 (a) of the Communications Act to provide for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present ones, which were commenced prior to its enactment. Section 14.

³ An additional motion to strike paragraphs 13, 14 and 16 of the NBC amended complaint (R. 232-233) on the ground that the programs described therein were not within paragraph (b) of the rules was unopposed and was granted by the district court.

A. *The proceedings before the Commission*

The proceeding which culminated in the rules at issue was instituted as the fairest and most appropriate procedure for formulating the Commission's position on a matter which had been the cause of concern over a considerable period of time.⁴ The widespread use of "give-away" programs during the 1940's by licensees caused concern on the Commission's part as to whether the programs were in violation of the then Section 316 of the Communications Act which prohibited the broadcast of any "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance".⁵ In 1940 the Commission submitted to the Attorney General for his consideration several programs which raised questions of violation of the statute. The Attorney General advised the Commission that

⁴ For early case, see *WRBL Radio Station, Inc.*, 2 F. C. C. 687.

⁵ Section 316 provided: "No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than \$1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs."

action by the Department of Justice was not believed to be warranted. The Department did not state its reasons for this conclusion.*

After the war, on October 6, 1947, the Commission instituted an investigative proceeding with respect to a program called "Dollars for Answers" broadcast by station WARL, Arlington, Virginia, to determine if the program was in violation of Section 316. On this program, broadcast at half-hour intervals through the day, persons chosen at random were called by telephone and asked a question, a correct answer to which entitled them to a prize. A different question was used for each broadcast, and both the question and answer were broadcast by the station prior to each call. The matter was heard before an examiner, who issued a Recommended Report holding that the program was in violation of the statute. *Northern Virginia Broadcasters, Inc.*, 4 Pike & Fischer, R. R. 662.

While the *Northern Virginia Broadcasters* proceeding was still pending, the Commission decided to institute a general rule-making proceeding rather than handle the problems presented in this field on a case-to-case basis. Adoption of the rule-making procedure made it possible for all interested parties to submit their views on a matter of general interest to all broadcast

* See Exhibits E-1 through J-2, Affidavit of G. D. Zorbaugh, in support of motion of American Broadcasting Company, Inc. for summary judgment (R. 30-63).

licensees, and avoided the possible hardship of an adverse determination in an individual licensing proceeding. Accordingly, on August 5, 1948 a notice of proposed rule making was released (R. 157).⁷ The notice referred to Section 316 of the Communications Act, *supra*. It recited that the proposed rules were intended to afford licensees as specific advance information as possible of the types of programs believed to be in violation of the Act. On June 25, 1948 Section 316 was removed from the Communications Act and recodified with editorial changes in language as 18 U. S. C. 1304, effective September 1, 1948. This took place as a part of the recodification of Federal criminal law and the enactment of Title 18 as positive law.⁸ The Commission issued a Supplemental Notice of Proposed Rule Making on August 27, 1948, re-

⁷ "In the Matter of Promulgation of Rules Governing the Broadcast of Lottery Information," Docket 9113.

⁸ Public Law 772, 80th Cong., 2d Sess., 62 Stat. 683, 763. The section provides: "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

ferring to this change and requesting comments on the proposed rules from interested persons (R. 159). The Notice concisely set forth the Commission's statutory authority and its duty to implement the policy of Congress that licensed stations not be permitted to broadcast lotteries. It also stated that an oral argument or hearing would be held if warranted by any of the comments filed.

Comments and briefs were filed by a number of parties, including the appellees herein. These written submissions went to the authority of the Commission to adopt the proposed rules, the proper interpretation of 18 U. S. C. 1304, and the policy involved.

On October 19, 1948 the Commission *en banc* heard oral argument on the proposed rules, in which appellees and eight other parties participated. After consideration of the written comments and the oral argument,⁹ the Commission, one Commissioner dissenting, on August 18, 1949 adopted its Report and Order promulgating the rules in issue (R. 161). The rules adopted were somewhat altered from the proposed rules in light of the comments received. The Report and Order discussed the reasons for adoption of the rules and the objections which had been raised to

⁹ The briefs and comments submitted to the Commission, and the transcript of the oral argument, were filed as Exhibit A to an affidavit in support of the Government's motions, but have been omitted in printing.

them. It pointed out that Section 1304, which prohibits the broadcast of lotteries and similar schemes by stations licensed by the Commission, is a declaration of policy by Congress directly applicable to exercise of the Commission's authority and duty to grant broadcast licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcast licenses. The Commission concluded that it was empowered to issue the rules and that they would serve the useful purpose of providing guidance to broadcast licensees.¹⁰ The Report and Order states (R. 161-162):

These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal

¹⁰ On October 28, 1949, the proceeding involving station WARL was dismissed in view of the adoption of the new rules and the present litigation in which the pertinent issues of law were presented for adjudication. *Northern Virginia Broadcasters, Inc.*, 4 Pike & Fischer, R. R. 660.

thereof is qualified to operate his station in the public interest.

B. The decision below

Both the Commission's statutory authority to adopt the rules and the interpretation of 18 U. S. C. 1304 which they contain were challenged below. The questions raised by appellees in the district court were essentially the following:

1. Whether the Federal Communications Commission has statutory authority to adopt regulations (a) interpreting a criminal statute (18 U. S. C. 1304) pertaining to the broadcast of information as to lotteries, gift enterprises, and other similar schemes, and (b) providing that the Commission will deny licenses to those who follow a practice of violating the statute as thus interpreted.

2. Whether the regulations properly interpret the criminal statute.

3. Whether the regulations constitute an abridgement of freedom of speech, or are otherwise unconstitutional, or contravene Section 9 (a) of the Administrative Procedure Act.

The district court unanimously sustained the validity of the rules in all respects other than the interpretation of lottery consideration contained in subdivisions (2), (3), and (4) of paragraph (b) (R. 110). It held that the rules had been adopted through a rule-making procedure con-

forming to the Administrative Procedure Act, and that the rule-making process was properly utilized in connection with the Commission's licensing functions to prevent the issuance of licenses to those violating a criminal law specifically applicable to the operation of licensed radio and television facilities. Communications Act of 1934, as amended, Sections 4 (i), 303 (r), 307 (a), 308, 309 (a), 312.¹¹ Section 9 (a) of the Administrative Procedure Act, prohibiting unauthorized sanctions, was found to be inapplicable. *Regents of Georgia v. Carroll*, 338 U. S. 586 (R. 121-123).

The district court also held that the rules do not violate the First Amendment to the Constitution insofar as they are within the criminal statute they interpret,¹² nor the Fifth or Sixth

¹¹ Sections 308, 309 and 312 were amended in particulars not relevant to this action subsequent to the adoption of the rules by the Communications Act Amendments, 1952, 66 Stat. 711, *et seq.* With respect to the Commission's authority, see *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223; *Stahlman v. Federal Communications Commission*, 126 F. 2d 124 (C. A. D. C.); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, cited below. See also, *National Broadcasting Co. v. United States*, 319 U. S. 190; *Southern S. S. Co. v. Labor Board*, 316 U. S. 31; *Mester v. United States*, 70 F. Supp. 118 (E. D. N. Y.), *affd.*, 332 U. S. 749.

¹² Citing *In re Rapier*, 143 U. S. 110; *Horner v. United States*, 147 U. S. 449; *Donaldson v. Read Magazine*, 333 U. S. 178; *National Broadcasting Co. v. United States*, 319 U. S. 190, 227; *Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351 (C. A. D. C.).

Although the district court's opinion states that the rules

Amendments (R. 129-131). Claims of violation of Article III, Section 2, Clause 3 of the Constitution (criminal trial by jury), and Article 1, Section 9, Clause 3 (bills of attainder), were also found to be without merit (R. 131).

With respect to the interpretative portions of the rules, the district court found that programs covered by them contain the elements of chance and prize within the meaning of Section 1304.¹³ On the question of consideration, subdivision (1) of paragraph (b) was also found to be a proper interpretation of the criminal statute in denominating as consideration the furnishing of money or any thing of value, or the possession of a sponsor's product (R. 132).

In these rulings on paragraphs (a) and (b) (1) of the rules, the district court thus sustained

may be considered a form of censorship to the extent that they go beyond Section 1304 with respect to the element of consideration, this question is unnecessary of decision since the rules are specifically intended to interpret the criminal statute and do not purport to go beyond it. If the rules do go beyond the statute, they fall for that reason and no constitutional question is reached.

¹³ No issue was presented as to prize. The Commission's position on chance was that the *entire* scheme by which winners are chosen will be considered in determining the part, if any, played by chance. Thus, where the selection of the ultimate winner occurs in two stages—i. e., the selection of a small group from a larger one followed by the selection of a winner from the small group—the method of selection at each stage must be scrutinized to determine if the selection is effected by chance. The language of the rule is essentially that of 18 U. S. C. 1304, and the validity of a particular scheme must turn upon the facts of the particular case.

both the Commission's authority to adopt the rules and its interpretation of the basic statute prohibiting the broadcast of lotteries. Subdivisions (2), (3) and (4) of paragraph (b), however, were found to be an improper interpretation of Section 1304, Circuit Judge Clark dissenting from this portion of the decision. These subdivisions cover those instances where participants are required, directly or indirectly, to listen to (or view) the programs of commercial broadcast stations as a condition of being eligible to win a prize. The majority below ruled that such schemes would not come within 18 U. S. C. 1304 on the ground that the statute contemplates only a valuable consideration, a "price" or "thing of value" to be weighed in terms of the value to the participant of what he gives (R. 125).

Judge Clark, dissenting, emphasized that the statute is broadly drawn. He pointed out that Section 1304 prohibits not merely lotteries, but gift enterprizes and any "similar scheme" offering prizes dependent upon chance, and that it does not mention consideration. Judge Clark stated (R. 134-135):

My brothers, it seems to me, are drawn away from the natural answer by the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an over-precise formulation of the issue, as I have pointed out) is not value "to the station or sponsor,"

but "It is the value to the participant of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recog-

nized in the well reasoned cases, such as *State v. Wilson*, 109 Vt. 349, 196 A. 757, cited below.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Rules and Regulations of the Federal Communications Commission adopted in its Report and Order of August 18, 1949 go beyond, and constitute an incorrect interpretation of, Section 1304, Title 18, United States Code and are an unlawful exercise of the rule making power.

2. In granting appellees' motions for summary judgment in part by permanently enjoining the Federal Communications Commission from enforcing said subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations and, to that extent, vacating and setting aside the Commission's order adopting said Rules.

3. In denying the motions to dismiss the amended complaints or, in the alternative, for summary judgment in favor of appellant, to the extent that the Court did so in denying the motions to dismiss the amended complaints and in granting appellant's motions for summary judgment only in respect to paragraphs (a) and (b) (1) of Sec-

tions 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations.

SUMMARY OF ARGUMENT

In 18 U. S. C. 1304, Congress has prohibited the broadcast of all lotteries and similar schemes offering prizes dependent in whole or in part upon lot or chance. This statute, as is the case with all Federal anti-lottery legislation, is broadly drawn and does not in terms make consideration a requisite of the prohibited schemes. To the extent that consideration may be read into the statute as inherent in the lottery concept, it is present in the so-called give-away programs covered by the Commission's rules at issue.

Radio and television give-aways are not altruistic undertakings. Like all other lottery schemes, their purpose and effect is to derive a profit from an appeal to the cupidity and gambling instinct of the participants. These participants are not the passive recipients of munificent gifts. On the contrary, the lure of a large prize is held out to induce affirmative action which is of substantial benefit to both station and advertiser. Such indirect consideration is a staple of numerous schemes devised to stimulate otherwise legal sales of products and services by adding the lottery ingredient. Schemes embodying such indirect consideration have consistently been held illegal by the better reasoned decisions in the field. These decisions have rejected the test of considera-

tion adopted by the majority below: that there must be a "price" or "thing of value" paid by the participants in order to have a lottery or similar scheme.

Congress indicated its purpose to strike at all forms of lotteries and similar schemes which savor of a lottery. The schemes forbidden by the statute are not limited to those which impoverish the participants, or even involve risk of pecuniary loss to them. *Horner v. United States*, 147 U. S. 449. The programs embraced by the Commission's rules are designed to "buy" an audience by the lure of a prize awarded by chance. The rules constitute a correct interpretation of 18 U. S. C. 1304, and should be sustained.

ARGUMENT

WHERE A PRIZE AWARDED IN WHOLE OR IN PART BY CHANCE IS NOT A GIFT, BUT IS GIVEN IN RETURN FOR REQUIRED ACTS WHICH ARE CALCULATED TO BE OF FINANCIAL GAIN TO THE PROMOTER, THERE IS A LOTTERY OR SIMILAR SCHEME WITHIN 18 U. S. C. 1304

INTRODUCTION

In their posture before the district court these cases raised a variety of broad issues relating to the power of the Federal Communications Commission to promulgate by rule a licensing policy based upon the interpretation of a criminal statute relating to broadcasting. Those broad issues have been resolved by the unanimous decision of the district court sustaining the Commission's

power, and the failure of appellees to take any appeal from that decision. Similarly, certain portions of the rules originally challenged (paragraph a, and paragraph b (1), *supra*, pp. 3-4) were sustained below, and are not now open to review in light of appellees' failure to appeal.

The issue before the Court is a narrow one. The Commission has concluded that, to the extent that prizes are distributed by chance, certain types of so-called radio give-away shows are essentially lotteries or similar schemes within the meaning of a specific criminal statute relating to the broadcast of lotteries. Accordingly, the Commission has defined the types of programs it believes to fall within the ban of the statute, and has announced that it will deny licenses to those who regularly broadcast such programs. The rules now at issue provide in substance that a give-away scheme in which one must listen to or view the program in order to win a prize distributed by chance is in violation of 18 U. S. C. 1304. By a divided vote, the court below has disagreed with the Commission's interpretation and set aside the rules in question. We propose to demonstrate by an analysis of the statute and its genesis, as well as the judicial decisions interpreting lottery law, that the result reached by the district court is not "consistent with law, or, indeed, with reason" (Clark, J., dissenting, R. 132).

Anti-lottery legislation may be characterized as moral legislation, designed to protect people from their own instincts of cupidity. Like all such legislation, it tends to be unpopular, and an agency which undertakes to enforce it invites the criticism that it is merely seeking to impose its own moral precepts. It must be pointed out, however, that this particular moral legislation relates specifically to broadcasting and that it is a clear-cut congressional declaration of public policy. The Commission cannot fail to give effect to that Congressional policy in carrying out its licensing functions.¹⁴

The Commission's study of give-away programs left it with the firm conviction that those programs are nothing but age old lotteries in a slightly new form. The new form results from the fact that the schemes here are illicit appendages to legitimate advertising. The classic lottery looked to advance cash payments by the participants as the source of profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising.

¹⁴ Indeed, representatives of a large segment of the radio industry have recognized, and condemned, programs designed to "buy" the radio audience by requiring it to listen in the hope of a reward. "The Television Code" of the National Association of Radio and Television Broadcasters, effective March 1, 1952, states (p. 2) that "Any telecasting designed to 'buy' the television audience by requiring it to listen and/or view in hope of reward, rather than for the quality of the program, should be avoided."

Consideration in the form of payment of money or a thing of value is not a prerequisite of a lottery or similar scheme under the statute, or under the better reasoned cases. The essence of a lottery lies in the profit reaped by its promoter from the exploitation of the cupidity of the participants which leads the latter to take action beneficial to the promoter. The bait or lure is in the form of a prize to be distributed by chance to one lucky participant. Each hopeful participant acts in reliance upon the possibility—however slim it may be statistically—that he will hit the jackpot.

Thus the role of consideration is a limited one. It serves to distinguish the pure gift from the profit making scheme. Unless the promoter receives some benefit directly or indirectly from the participants, the scheme loses an essential flavor of exploitation and unjust enrichment. The rich man in the motion picture "If I Had a Million" (Paramount Publix Corporation, 1932) who gave away his millions to persons chosen at random was not conducting a lottery. Nothing was required of the beneficiaries of his whimsical generosity, and no benefits flowed to him. But in looking for some consideration in a scheme, we must not seek "a symbolic peppercorn" such as would "formalize a contract or a conveyance" (Clark, J., dissenting below, R. 135). The proper test as Judge Clark convincingly demonstrated, "is a practical one, *perceptive of the fact that the*

yield to the operator is surely all important" [*ibid.*; emphasis supplied].

The schemes proscribed by the rules in issue fully meet this practical test. Subdivisions (2), (3) and (4) of paragraph (b) of the rules, which were set aside by the district court and are in issue upon this appeal, cover those schemes where in order to be eligible to win or compete for a prize:

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or

in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

These subsections therefore delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize.¹⁵

¹⁵ An example of a typical give-away is "Sing It Again." A script of this program is attached to the CBS amended complaint as Exhibit I (R. 256-274). The program is described in the CBS amended complaint as follows (R. 247):

"Performers sang a popular song and then repeated it but this time with parody lyrics describing some person, place, event, or the like. Contestants, selected at random from phone books, were called on the telephone during the program. The contestants paid nothing in order to compete. They were asked to identify the person, place or event described by the parody lyrics which they heard over the radio. If the contestant answered correctly, he won a prize and then had a chance to identify a secret voice. The secret voice sang giving clues as to his or her identity. Additional clues were also given on the program and on other programs. The person identifying the secret voice won a main prize. The main prize was increased week by week until the proper identification was made.

"If the contestant failed to identify the person referred to in the parody lyrics he was given a prize of lesser value (hereinafter referred to as a 'consolation prize'), and then another contestant in the studio, chosen by lot by the number on the stub of his admission ticket, was given the opportunity to answer and win a prize. He was awarded no prize if he answered incorrectly. The contestant in the studio had no opportunity to try for the mystery voice main prizes. The studio contestants were admitted to the studio without charge and paid nothing in order to compete."

CBS stated below (Br. 24) that this program came within

While the requirement that a participant listen to (or view) the program may be stated in terms, it may also be made a practical necessity by furnishing clues from program to program, playing a song over the air which must be identified, or otherwise inducing attention as provided for in subdivisions (3) and (4). The format of individual programs of course changes from time to time. But the end result is the same in any program covered by the rules. Those who hope to win give the program their close attention.

That the purpose of requiring attention to sponsored broadcasts as a requisite of eligibility for winning a prize is to increase sales and enable the station to sell time is obvious and apparently not disputed.¹⁸ Commercial radio

subdivision (3), and also that "few contestants selected from the radio or television audience, i. e., non-studio contestants, unless they listened to or viewed the programs, would be in a position to answer correctly the questions asked of them."

A substantially similar program on television was the TV version of "Stop the Music". A transcription of a typical broadcast is in Exhibit K to the affidavit of G. B. Zorbaugh in support of ABC motion for summary judgment (R. 79-89).

¹⁸ Judge Leibell stated for the majority below (R. 125), "We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. It would be a mistake to assume that everyone who listens to the program on the radio or views it on television, does so in the hope that he may receive a telephone call to act

and television stations in the United States are sustained by the revenue received from sponsors who utilize the stations as advertising media. Radio advertising, like other advertising, must be communicated to be effective. It is axiomatic that the value of the advertising to the sponsor is directly related to the size and makeup of the audience reached by the advertisement. This Court has pointed out that a licensee of a commercial broadcast station will "survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission v. Sanders Radio Station*, 309 U. S. 470, 475.

The Commission's Report and Order adopting the rules accordingly stated (R. 168):

We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create "circulation" as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's

as a participant and win a prize; but that many may harbor that hope is probably true, otherwise that feature of the program would not be included. If it adds to the value of the program for a sponsor, it has a money value to the broadcasting station."

advertising message may be delivered and the listener induced to purchase the sponsor's product or services.

As will be shown in detail herein, the radio give-away programs have all the essential ingredients of a traditional lottery. Only the form of the scheme is somewhat different. The broad remedial purpose of the statute will not be served unless the courts are vigilant in striking down new guises of the old evil at which the statute is aimed. With respect to the very similar scheme known as Bank Night, the majority of courts were quick to stamp as a lottery a scheme which, despite a different appearance, had all the basic ingredients of a lottery. It is submitted that the same result should be reached here.

A. The background and scope of 18 U. S. C. 1304

Section 1304 of the Criminal Code does not represent a novel foray into the field of moral legislation. It is the latest enactment in a long series of Federal provisions designed to combat lotteries and similar schemes in areas subject to Federal authority. While this statute was aptly characterized by Judge Clark, dissenting below, as falling within the class of "attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical" (R. 135), its history makes clear the consistent judgment of Congress over a period of many

years that lotteries and all similar schemes represent a serious evil. The widespread evils of lotteries and similar schemes in the past have led not only Congress, but the constitutional conventions and legislatures of the several States, to prohibit all such schemes in the most sweeping of terms.

The history of lotteries, both in England and this country, is one of an early tolerance being replaced by a steadily developing public policy against use of such devices for public or private purposes.¹⁷ Lotteries were at one time utilized by government in both countries as a ready source of revenue for state and semi-public purposes. Apparently the first such use in England was as early as the reign of Queen Elizabeth. This first lottery was authorized in 1566 and actually drawn in 1569.¹⁸ From that time until 1826 lotteries

¹⁷ For the history of lotteries in England and the United States, see Ashton, *A History of English Lotteries* (1893); Thomas, *Law of Lotteries, Frauds and Obscenity in the Mail* (1903) pp. 1-9; Williams, *Flexible-Participation Lotteries* (1938), pp. 1-21; Spofford, *Lotteries in American History*, at p. 171 of American Historical Association Report for 1892; Final Report of Royal Commission on Lotteries and Betting (1933), Chapter I; Gaming and Wagering, Vol. 10 Encyclopaedia Britannica, p. 11.

¹⁸ The lottery bill is quoted in full in Ashton, *A History of English Lotteries*, pp. 5-16. The price was "the summe of tenne shillings sterling onely, and no more", and in addition to numerous lesser prizes "whoever shall winne the greatest and most excellent price" [prize] was to receive five thousand pounds sterling in money and goods. The object was "the reparation of the havens and strength of the Realme, and

were authorized by the King and later by Parliament, being used for special purposes and the general needs of the State.

Lotteries were also common in the American colonies and in the new States for years after the adoption of the Constitution, many being organized for public purposes. The beginning of the new world was aided in 1612 when a lottery was authorized to help in the establishment of the Virginia colony. In later years, lotteries were used for various purposes. The proprietors of Pennsylvania attempted to sell land by lottery, and a lottery was organized in 1748 in Philadelphia to erect a battery of cannon on the Delaware. Money raised by lotteries repaired the beach at Plymouth in 1812, rebuilt Faneuil Hall in Boston in 1764, and repaired the streets of Charlestown in 1779. Even the expenses of the revolution were in part defrayed by the proceeds of lotteries authorized by the Continental Congress.¹⁹

towards such other publique good workes." The drawing was held at the west door of St. Paul's Cathedral in London.

¹⁹ See Spofford, *Lotteries in American History*, pp. 173-195 of American Historical Association Report for 1892. An 1812 Act of Congress authorizing the City of Washington to provide for lotteries under specified conditions (that they be for public improvements, limited to \$10,000 a year, and subject to Presidential approval) caused trouble when tickets were sold in Virginia where lotteries were illegal. This Court held in *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264 that the statute did not authorize the City of Washington to force the sale of tickets where they were prohibited by law, although legal at their origin.

In England, private lotteries were forbidden long before the government ceased to make use of them as a source of revenue. The last lottery authorized by Parliament was held in 1826. But the Unlawful Games Act (33 Hen. 8, c. 9) had prohibited certain games such as dice, cards, and even tennis, in 1541, and the first statute directed specifically at lotteries was 10 Will. 3, c. 23 in 1698. It declared them to be a common and public nuisance. It was followed by a number of additional statutes which culminated in the Betting and Lotteries Act of 1934 (24 and 25 Geo. 5 c. 58).²⁰ This act made all lotteries unlawful, with the exception of specified private lotteries conducted as an incident to bazaars, fetes, etc., and lotteries conducted by Art Unions.

The English statute is similar to the pattern of legislation adopted by Congress in that it contains no limiting definition and does not mention pecuniary consideration as a necessary element. For the detrimental social and economic effects of the lottery scheme in a developing society had long been recognized as broader than immediate impoverishment of the poor and credulous. The spectacle of gullible persons who can least afford it squandering their savings or small earnings on

²⁰ The 1934 statute followed the comprehensive Report of the Royal Commission on Lotteries and Betting (1933). The Statute Law Revision Act (14 Geo. 6 c. 6, 1950) repealed that part of the 1934 Act which listed the prior acts there repealed, with a provision that the prior repeal was not thereby affected.

lottery schemes was undoubtedly a prime factor in the first English anti-lottery legislation, as was the frequent concurrence of fraud. See preamble to 10 Will. 3, c. 23. But by 1808 a Select Committee strongly condemned even regulated State lotteries, stating:

In truth, the foundation of the Lottery is so radically vicious, that your Committee feel convinced that, under no system of regulations which can be devised, will it be possible for Parliament to adopt it as an efficient source of Revenue, and at the same time divest it of all the Evils and Calamities of which it has hitherto proved so baneful a source. A spirit of adventure must be excited amongst the community, in order that Government may derive from it a pecuniary resource. That spirit is to be checked at a certain given point, in order that no Evils may attend it—the latter object has not hitherto been attained; with all the pains which have been bestowed upon it. Your Committee are of opinion that its attainment is impossible.²¹

In addition to the impoverishment often resulting from the improvidence of the poor, the Committee strongly condemned the lottery's effect upon character and the spirit of speculation it induced in a manufacturing and commercial nation.

²¹ Extracts from the Second Report of the Select Committee on the Laws Relating to Lotteries (1808) reprinted as Appendix II to the Report of the Royal Commission on Lotteries and Betting (1933).

In 1933, the Royal Commission on Lotteries and Betting issued its Final Report surveying existing law and practice, and again advising against the lottery as a means of raising revenue. Its finding was that (p. 132) "The effects of large lotteries upon character are more subtle and harder to determine but may well be more important in the long run than the material results."

On this side of the Atlantic, as in England, private lotteries were frequently prohibited while the colonies, and later the States, themselves utilized lotteries for public purposes. This background of early public use probably accounts for the form taken by many State constitutions in which the legislature is specifically forbidden to authorize any lotteries.²² Anti-lottery constitutional provisions and legislation were enacted

²² As early as 1721 New York prohibited unlicensed lotteries. In 1821 it adopted a constitutional prohibition against all future lotteries, and authorized legislation against them, except for those already provided for by law. In 1833 all lotteries were made illegal. See *The People v. Sturdevant*, 23 Wend. 417 (N. Y. Sup. Ct.).

In Pennsylvania, a committee of the House of Representatives reported in 1832 that the only lottery authorized by the legislature then still in active operation was that of the Union Canal Company. It had been authorized to raise funds by means of a lottery as early as 1795. The Committee reported that the company had exhausted its privileges, and warned of the danger of trusting to any system of finance based upon so immoral a foundation. Report of the Committee of the House of Representatives of Pennsylvania on Lotteries (1832).

throughout the 19th Century, and the Louisiana lottery, the last authorized lottery, disappeared from the scene in 1893. Today 37 States have anti-lottery provisions in their constitutions, and all forty-eight States have enacted anti-lottery legislation.²³ The constantly increasing pressure against lotteries in the various states was made fully effective by concurrent Federal legislation, and the present statute prohibiting the use of radio for the promotion of lotteries is a direct outgrowth of the earlier laws keeping the mails from being made an instrument of lottery schemes.

Congress first took action against lotteries in 1827 by prohibiting postmasters from acting as agents for lottery offices and from receiving "lottery schemes, circulars or tickets" free of postage (4 Stat. 238, Sec. 6). In 1868 it was made unlawful to send by mail "any letters or circulars concerning lotteries, so-called gift concerts or similar enterprises offering prizes of any kind on any pretext whatever." (Act of July 27, 1868, section 13, 15 Stat. 194, 196).²⁴ This Act was followed four years later by an act prohibiting the mailing of letters or circulars concerning *illegal* "lotteries, so-called gift-concerts, or other

²³ See Appendix A, *infra*, p. 66.

²⁴ An amendment authorizing postmasters to withhold the delivery of suspected letters was stricken out in conference. 82 Congressional Globe, July 24, 1868, p. 4412.

similar enterprises offering prizes * * *." (Section 149 of the Act of June 8, 1872, 17 Stat. 283, 302).²⁵ The word "illegal" was soon stricken out (Section 2 of the Act of July 12, 1876, 19 Stat. 90).

The next revision of the postal laws came in the Act of September 19, 1890 (26 Stat. 465), when the existing law was further tightened. The law was amended to include newspapers containing "any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance" (Section 1), and the general language prohibiting use of the mails was changed to refer to "any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance" (Section 1). The Postmaster-General was also authorized, upon evidence satisfactory to him, to return registered letters and forbid the payment of postal money orders when satisfied that there was involved "any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind * * *" (Sections 2, 3).

By the Act of March 2, 1895 (28 Stat. 963) the previous authorization with respect to registered letters was extended to all letters (Section

²⁵ Section 300 also authorized the issuance by the Postmaster General of fraud orders against fraudulent lotteries. This language was not changed in 1876 when "illegal" was stricken out.

4), and it was made a crime to bring into the United States any advertisement of, or paper representing an interest in or dependent upon the event of, "a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance * * *" (Section 1).

When the penal laws were codified and revised in the Act of March 4, 1909, the lottery laws were further strengthened by the addition of the words dependent "in whole or in part" upon lot or chance (Sections 213, 214, 237, 35 Stat. 1129, 1130, 1136). This act was described as bringing within its operation "all schemes savoring of a lottery". S. Rep. 10, Part 1, on S. 2982, 60th Cong., 1st Sess., p. 22. The final step was the enactment of Section 316 of the Communications Act of 1934, which is now 18 U. S. C. 1304 (see p. 9, *supra*). This section contains the same language as the 1909 enactment, and its purpose must be assumed to have been equally broad.

Today Federal law prohibits lotteries in Alaska (48 U. S. C. 77) and Hawaii (48 U. S. C. 562). It also contains both criminal and civil provisions prohibiting the use of the mails for lottery schemes (18 U. S. C. 1302, 1303, formerly 18 U. S. C., 1940 ed. 336, 337; 39 U. S. C. 732 (formerly R. S. 4041), 259 (formerly R. S. 3929)), and forbids the importation into the United States or the carriage in interstate commerce of lottery materials (18 U. S. C. 1301, formerly 18 U. S. C.,

1940 ed. 387).²⁶ And the statute in the case at bar brings the new medium of radio within the framework of the prohibitions against any form of lottery scheme (18 U. S. C. 1304, formerly 47 U. S. C. 316). Indeed, the only exemption provided by Federal law is for fishing contests *not conducted for profit* (18 U. S. C. 1305).

Although the first enactment in 1827 was limited to "lottery schemes, circulars or tickets," the phraseology of the Federal statutes was broadened in 1868 and has remained in essentially the same form to this date. And the courts of this country have recognized in lottery schemes the same broad and pervading evils found by the English. Strikingly similar to the statement of the British Select Committee in 1808 is the language of this Court in *Stone v. Mississippi*, 101 U. S. 814, 821:

Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others.

Lotteries are generally designed to profit their promoters, but it is an unrealistic notion that they must also be designed to bankrupt the par-

²⁶ 19 U. S. C. 1305 (a) also provides that lottery tickets and advertisements of lotteries shall not be admitted into the United States.

ticipants. It was argued below (CBS Br. 41) that the evil at which Section 1304 and similar statutes are directed is solely the tendency of lotteries to impoverish and pauperize the public. And the majority of the district court apparently adopted its test of a "price" in large part upon the ground that this test was the only one consistent with the risk of pecuniary loss. It sought, in effect, a specific form of gambling (R. 128). However, the deleterious effects of lotteries are not always so direct as immediate impoverishment nor need the scheme itself take the form of a wager. The courts have consistently held to be lotteries schemes where risk of loss in a direct gambling sense was in no way involved and where impoverishment could not possibly have been thought the primary evil.

The decision by this Court in the leading case of *Horner v. United States*, 147 U. S. 449, makes very clear that pauperism is not the only evil of lotteries. In the *Horner* case the year of redemption of bonds sold by the Austrian Government was determined by a series of drawings. Other large additional amounts to be paid on certain of the bonds were also determined by the drawings. All of the bonds were to be redeemed and there was no question of their being worth less than the price paid.

It was urged upon this Court that the money received from the bonds was not to be used to

repay them or to pay the prizes, and that as the primary object was a loan, the issuance of the bonds was not transformed into a lottery because of the subsidiary features which were like a lottery. It was also apparently urged that as there was no question of financial loss, there could be no lottery. Both arguments were rejected. The Court stated that it was "quite evident that she [Austria] undertook to assist her credit by an appeal to the cupidity of those who had money" (147 U. S. at 459), and held the scheme to be a "lottery or similar scheme". In citing with approval the Maryland case of *Ballock v. State*, 73 Md. 1 (dealing with the same bonds), this Court also approved the rejection in that case of the specious argument that "because the money ventured must all come back, with interest, so that there could be no final loss, it could not be a lottery" (147 U. S. at 462).

If the risk of loss were the sole evil of lotteries, the *Horner* case would have been decided otherwise. There was no impoverishment and no exploitation of the poor. But this Court expressly recognized that the broader evil sought to be eradicated is the promotion of a "gambling spirit and a love of making gain through the chance of dice, cards, wheel or other method of settling a contingency" (147 U. S. at 462).²⁷ Thus, as Judge Clark pointed out below (R. 133-4):

²⁷ It has been pointedly observed of the *Horner* case by a former Assistant Attorney General for the Post Office De-

Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner v. United States*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.²⁸

partment in an authoritative text: "Who was *wronged in the Horner case?* Did not every investor get back his money with interest, and was there in a single instance final loss to anyone? No. Those who drew prizes were simply benefited above their fellows. But somebody was wronged in the *Horner case* * * *. The Supreme Court of the United States assumed that some bought Austrian bonds *because prizes were offered, who would not otherwise have invested*, and in such case such party was wronged, not because he would lose anything by the transaction, but because he was by improper means induced to buy something that he would not have bought in the absence of such means." Thomas, *Lotteries, Frauds and Obscenity in the Mails* (1903), 32.

²⁸ As was said in *State v. Dorau*, 124 Conn. 160, 163, 198 A. 573, 574, "The evil of gambling and like practices is not by any means confined to the impoverishment and squandering of the money which directly results from the making of a wager."

For further recognition and condemnation of the broad evils of lottery schemes, see *Central States Theatre Corp. v. Patz*, 11 F. Supp. 566 (S. D. Iowa); *Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892; *State v. McEwan*, 343 Mo. 213, 120 S. W. 2d 1098; *State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605, 607; *State ex. Inf. McKittrick v. Globe-Democrat Publishing Co.*, 110 S. W. 2d 705 (Mo.); *Troy Amusement Co. v. Attenweiler*,

The many cases involving various types of gift enterprises also show clearly that the evil at which the statute is aimed is not limited to impoverishment. While the lottery has maintained its traditional elements, and could not change them without loss of both appeal and profit, it has not been limited to its traditional form. The gift enterprise is perhaps the most common example of the attempt to engraft illegal lottery techniques and principles upon otherwise legal sales of goods. With the purchase of an article goes the chance to win a prize. It is simple, effective and illegal.

That the term "gift enterprise" is sufficiently definite and embraces a class of transactions which may validly be condemned was settled in *Matter of Gregory*, 219 U. S. 210. And it has been uniformly held that where purchase of an article entitles the purchaser to a chance at a prize, a lottery by way of gift enterprise exists even where the article alone may be well worth its price. *Horner v. United States*, *supra*; *Bell v. The State*, 37 Tenn. (5 Sneed) 507; *United States v. One Box of Tobacco*, 190 Fed. 731 (C. C. A. 4); *Rountree v. Ingle*, 94 S. C. 231, 77 S. E. 931; *Whitley v. McConnell*, 133 Ga. 738,

64 Ohio App. 105, 28 N. E. 2d 207, *aff'd*, 137 Ohio St. 460, 30 N. E. 2d 799; *Seidenbender v. Charles*, 4 Sergeant & Rawle 151, 8 Am. Dec. 682; *Thomas v. The People*, 59 Ill. 160. "If you cheat people, you affect their pocketbook; if you encourage them to gamble, you affect their character." *Minter v. Federal Trade Commission*, 102 F. 2d 69, 71 (C. A. 3).

66 S. E. 933; *Standridge v. Williford-Burns-Rice Co.*, 148 Ga. 283, 96 S. E. 498; *Utz v. Wolf*, 72 Ind. A. 572, 126 N. E. 327; *Corporate Organization & Audit Co. v. Hodges*, 47 App. D. C. 460²⁹ (a more complicated scheme in which merchants advertising in a newspaper received votes, which in turn were given to their customers. The newspaper gave the prize based upon the highest number of votes.); *Market Plumbing & Heating Supply Co. v. Spangenberg*, 112 N. J. L. 46, 169 A. 660, *affd.*, 114 N. J. L. 271, 176 A. 342; *Worden v. City of Louisville*, 279 Ky. 712, 131 S. W. 2d 923; *Try-Me Bottling Co. v. State*, 235 Ala. 207, 178 So. 231.

As the court stated in *Whitley v. McConnell*, 133 Ga. at 740, 66 S. E. at 933,

Enticing offers of this kind are unfortunately not uncommon in the effort to attract trade or make sales. But they are illegal. That a lottery or gift enterprise scheme is added to legitimate business to draw customers or buyers by appealing to the hope of securing something by chance, beyond the article actually bought, does not sanctify such an appeal to the gambling disposition so common in human nature, or make the agreement lawful.

The decisions in England are in accord: *Taylor v. Smetten* (1883) 11 Q. B. 207; *Hall v. McWil-*

²⁹ Cf., *Jolovitz v. Redington & Co.*, 88 A. 2d 589 (Me.); but see *Leonard v. Pennypacker*, 85 N. J. L. 333, 89 A. 26 finding chance lacking in a similar scheme.

liam (1901) 85 L. T. 239; *Hunt v. Williams* (1888) 52 J. P. 821; *Bartlett v. Parker* (1912) 2 K. B. 497.³⁰

Similar schemes which were variations of the gift enterprise have also consistently been found to fall within the ban of the law. Thus, in one case tickets given at a performance entitled a lucky holder to a present if the entrepreneur liked him and decided to give it to him. *State v. Shorts and Tilney*, 32 N. J. L. 398, 90 Am. Dec. 668. In *Dunn v. The People*, 40 Ill. 465, an envelope purchased for 25¢ contained a card listing merchandise which could then be bought for \$1. In *Thomas v. The People*, 59 Ill. 160, \$5 entitled one to an engraving and to tickets to lectures and concerts at which prizes were given. Newspaper subscribers were entitled to participate in the distribution of prizes by lot in *The State v. Mumford*, 73 Mo. 647. And in *Waite v. Press Publishing Ass'n.*, 155 Fed. 58 (C. C. A. 6), subscribers to a publication were entitled

³⁰ The law of England has been summarized in Halsbury's *Laws of England* (2d Ed.) Vol. 15, p. 526 as follows: "a scheme whereby cash or other gifts are offered to purchasers of commodities may be a lottery, notwithstanding that the commodities are in fact worth the money paid for them. In such a case nothing is added to the price of the article for the chance. But the chance, by offering an inducement to others to purchase, so increases the sale of the article that it becomes possible to provide the prizes out of the profits. It is only in this indirect way that the purchasers contribute to the prizes; but this contribution is sufficient to make the scheme a lottery."

to guess at the number of votes cast in a forthcoming Presidential election. In each case, the court followed a realistic approach. In each case the scheme was found to be a lottery.

The rulings of a great majority of the State courts facing the problem that Bank Night was illegal³¹ would similarly be unsound if the reasoning of the majority of the district court were valid. Bank Night appeared during the 1930's when motion picture receipts evidently needed a strong stimulant. It illustrates quite clearly a major attempt to mask the essential purposes of a lottery while retaining the full benefits of it for the promoter. While one version of Bank Night in which prizes given by lot were available only to paying patrons was obviously foredoomed to failure under the lottery laws, see *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.*, 276 Mich. 127, 267 N. W. 602, the scheme commonly took a less obvious form.

In the scheme generally employed, registration by the public at the theatre was free. Prizes could be won by patrons and non-patrons alike. The winners were announced both inside and outside the theatre, and it was merely necessary to appear at the theatre within a few minutes to claim the prize. Thus, no one who wanted to win a Bank Night prize had to pay anything for his chance.

³¹ See Appendix B, p. 72. The approach to Bank Night taken by different courts will be discussed more fully in Part B, *infra*.

Anyone could receive his chance without payment of a "price" or "thing of value." And those who did pay the admission fee of course saw the picture. But a large majority of the courts found the scheme illegal.³²

There is, therefore, no necessity for any "gamble" or risk of pecuniary loss in a gambling sense. An ordinary purchase may be involved. It may be one which would have been made in any event. But it may not be stimulated by the lure of a chance to win a prize. A gambling spirit, with its attendant evils, is aroused by the chance to "make a killing." The effects are multiplied when the prizes are so large as fairly to stagger the imagination and when the chance at them may come to any home. As Judge Clark stated (R. 133-4), the essential purpose of the law cannot be oversimplified to impoverishment.

It is significant in this connection that this Court has upheld the authority of the Federal

³² See e. g., *Grimes v. State*, 235 Ala. 192, 178 So. 73; *State v. McEwan*, 343 Mo. 213, 120 S. W. 2d 1098; *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 119-122, 28 N. E. 2d 207, 212-213, affd., 137 Ohio St. 460, 30 N. E. 2d 799; *Central States Theatre Corp. v. Pätz*, 11 F. Supp. 566 (S. D. Iowa); *State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605; *State ex rel. Draper v. Lynch*, 192 Okla. 497, 137 P. 2d 949; *State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547; *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 8 N. E. 2d 648; *Barker v. State*, 56 Ga. App. 705, 193 S. E. 605, *State v. Greater Huntington Theatre Corp.*, 133 W. Va. 252, 55 S. E. 2d 681; *Commonwealth v. Lund*, 142 Pa. Super. 208, 15 A. 2d 839, allocatur refused 142 Pa. Super. xxxi.

Trade Commission to prevent as unfair competition the use of the lure of chance to win prizes, even where the participants used only pennies. *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304. The scheme involved there was the sale of penny candies. Some, selling for 1 cent each, had a penny concealed in the wrapper; others had the retail price of 1, 2 or 3 cents marked on a piece of paper concealed in the wrapper; and others had colored centers entitling the purchaser to a prize. The Commission found the use of this selling device to be a lottery. The Court, in an opinion by Mr. Justice Stone, agreed that it was an unfair trade practice and further stated:

Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy (291 U. S. at 313).³³

³³ The attempt to distinguish the scheme in the *Keppel* case as one involving children, to whom loss of a small sum is of some consequence, has been specifically rejected. *Hofeller v. Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), cert. den., 299 U. S. 557. And see *Modernistic Candies v. Federal Trade Commission*, 145 F. 2d 454 (C. A. 7). The Court there condemned the use of lotteries in merchandising because of the improper appeal to the desire to "get something for nothing." See also *Consolidated Mfg. Co. v. Federal Trade*

Congress has not made likelihood of impoverishment or pecuniary loss a test for the existence of a lottery or similar scheme. It would have been a difficult standard to define, and difficult to administer. Any attempt to import such a standard judicially would lead to the same difficulty. This is well illustrated by the opinions below. The majority below, which was impressed by the impoverishment concept (R. 128), nevertheless apparently recognized that a one cent payment for a chance is enough. If the test were really impoverishment, however, would not a quantitative minimum have to be placed upon the "price" for a chance? Would this standard be applied differently to rich and poor? Surely, no impoverishment standard could realistically be formulated in disregard of these problems. Similarly a pecuniary loss standard would require weighing of imponderables in each individual case. Perhaps in recognition of such difficulties in drawing a line, Congress has outlawed *all* lotteries and similar schemes conducted by mail or radio. This Court's

Commission, 199 F. 2d 417 (C. A. 4); *Sweets Co. of America v. Federal Trade Commission*, 109 F. 2d 296 (C. A. 2).

The additional argument made in the district court (CBS Br. pp. 38-43) that the power of Congress to regulate interstate commerce is limited to preventing schemes which lead to pauperism is thus merely an attempt to narrow well recognized boundaries of Congressional power, and to disregard the leading precedents in the lottery field. See also *Matter of Gregory*, 219 U. S. 210; *Rast v. Van Deman & Lewis*, 240 U. S. 342.

decision in the *Horner* case and the many State authorities in accord with it, have wisely refused to make pecuniary loss the litmus test of a lottery or similar scheme.

B. The ingredient of consideration in the schemes outlawed under the Commission's rules

As has been pointed out, *supra*, consideration has never been an express requisite of a lottery or similar scheme under federal legislation. And no mention of the term is found in 18 U. S. C. 1304, the statute here involved. It is true that courts have traditionally looked for some form of consideration as a method of distinguishing a lottery from a purely eleemosynary project involving distribution of gifts by chance. But except where statutes have in terms required *valuable* consideration, the better reasoned cases have realistically declined to require that there be some formal money payment by the participants in a scheme in order to stamp it a lottery. Where a scheme of chance is successfully designed to reap profits for its promoter, there will ultimately be consideration flowing from the participants, and it is of no consequence whether such consideration be direct or indirect. In either event, the gambling spirit—the lure of obtaining something for nothing or almost nothing—is exploited for the benefit of the promoter of the scheme.

The application of the principle that consideration for a lottery may be indirect is strikingly exhibited in the Bank Night cases. For in Bank Night (described *supra*, p. 43) as in the "give-aways" no one is required to pay anything or buy anything. Both schemes rely upon indirection, and as to both it may be argued that from the standpoint of an individual participant, no consideration is furnished. But in each, the participants as a group pay for the prizes "given" away, and more besides. That a profit will result can never be assured in advance, but promoters of lotteries take a calculated risk as to future profit before they commit themselves to "give" the prizes.³⁴ Their purpose is not altruistic. And whether the ultimate source of profit be the tendency of persons enticed to the door of a theater to pay the price to enter it, or the tendency of persons enticed to listen to advertising to purchase the product advertised, the gain to the promoter of the scheme is directly traceable to the lure of the lottery.

Bank Night, however successful in the theatre, failed in court because it was apparent upon sound analysis that it was designed solely to increase patronage by the customary lottery bait. The attempt to divorce the offer of prizes by

³⁴ That this calculated risk is reasonably taken with the "give-aways" is shown by their great financial value. (See CBS brief below, p. 4; ABC Amended Complaint Par. 11, 15 (R. 5, 6)).

chance from the increase in gross receipts has been aptly characterized as "an attempt to sever cause from effect, to separate advertising from its results." *State v. Jones*, 44 N. M. 623, 627, 107 P. 2d 324, 326 (quoting Williams, *Flexible Participation Lotteries*).³⁵ The majority of courts have steadfastly refused to blind themselves to the causal relationship between the Bank Night scheme and increased theatre profits.³⁶ Typical of such decisions is that of the Court of Errors and Appeals of New Jersey in *Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 313, 25 A. 2d 892, 893, which flatly rejected the contention that a pecuniary consideration must be paid for the chance to win a prize, and which ruled the scheme an illegal lottery whose object was to "stimulate the patronage of [the] theatre by catering to the natural gambling instinct of humanity in general." The court said:

If the distribution of "prizes" were a pure gift, we could agree that the proceed-

³⁵ This decision expressly overruled *City of Roswell v. Jones*, 41 N. M. 258, 67 P. 2d 286, which had sustained the legality of Bank Night.

³⁶ *E. g.*, *Kessler v. Schreiber*, 39 F. Supp. 655 (S. D. N. Y.); *Affiliated Enterprises v. Waller*, 40 Del. 28, 5 A. 2d 257; *Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892; *Affiliated Enterprises, Inc. v. Gantz*, 86 F. 2d 597, 599 (C. A. 10); *State v. Wilson*, 109 Vt. 349, 359, 196 A. 757, 760; *State ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929; *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N. E. 2d 207; *State v. McEwan*, 343 Mo. 213, 120 S. W. 2d 1098; *State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605. For a tabulation of Bank Night cases, see Appendix B, p. 72.

ing did not constitute a lottery in the sense intended by the constitution and statute. * * * In the class of cases similar to that now before us—and there are a large number in the reports—an avowed object, and the inducement to a theatre proprietor to sign one of these contracts, is to stimulate the patronage of his theatre by catering to the natural gambling instinct of humanity in general. Those that pay to attend the performance may well be induced to do so when registering their names, by the prospect of hearing their names called and responding promptly. Those that have not paid for admission to the motion picture must at some inconvenience wait outside to be sure of hearing the announcement and of entering the theatre promptly thereafter. We have no hesitation in holding that the procedure was an unlawful “lottery” in the constitutional and statutory sense.

The same analysis is applicable to the case at bar, as Judge Clark’s dissenting opinion below makes clear. Prizes on radio give-away programs are not pure gifts. Not only is time and effort expended in listening to the programs, but it would be highly artificial to ignore the effect of the increased radio audience procured by the scheme on the revenues of the station and the advertiser who is enabled to reach the increased audience.

The search for an ultimate financial benefit to the promoter secured from the participants by the enticement of a prize dependent upon chance has been the keynote of many other decisions involving different schemes. As was said in *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581 (C. C. E. D. N. Y.), a suit to restrain the Postmaster from refusing to accept a newspaper as second class mail:

The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive. [Emphasis added.]

Three cases closely similar to the case at bar are *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N. W. 491; *Knox Industries Corp. v. State ex rel. Scanland*, 258 P. 2d 910 (Okla.); and *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242. In the *Regez* case, a drug store registered people throughout the city for a drawing. No fee or purchase was required, but it was necessary to pick up a free coupon at the store before each

day's drawing. In the *Knox* case, decided in 1953, an automobile was to be given away every 52 days among those holding tickets given free at defendant's service stations and stores. No purchase was required. In the *Maughs* case, people attending an auction were eligible for the prize without bidding or buying. In each of these cases, there was no "price" and no "thing of value" given as consideration for the chance. In each, as in *Bank Night* and the "give-aways", there was the same reliance upon an indirect consideration taking the scheme out of the realm of altruism and stamping it a lottery.³⁷

³⁷ As the court said in the *Maughs* case (157 Va. at 420, 161 S. E. 244):

"The object of the defendant unquestionably was to attract persons to the auction sale with the hope of deriving benefit from the crowd so augmented. Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal."

See also *Blair v. Lowham*, 73 Utah 599, 276 P. 292, where eligibility for a prize given at a resort was a ticket of admission, a railroad ticket on a line serving the resort, or a ticket to an adjoining race track; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, in which a fuel company sold tickets at 10¢ each to dealers who gave them away to customers and others (contempt found for evasion of decree, 242 Mich. 34); *State v. Bader*, 24 O. N. P. (N. S.) 186, *affirmed*, 21 Ohio L. R. 293, in which a cafeteria gave chances free to patrons and non-patrons alike.

Markedly similar also to the case at bar is the English case of *Willis v. Young* (1907) 1 K. B. 448. In that case, a newspaper had distributed medals gratuitously among members of the public. Each medal bore a number and the words, "Keep this, it may be worth 100£. See the *Weekly Telegraph* today." The winning numbers were published in the paper and this information could also be obtained at the newspaper office. It was not necessary to buy a paper. The court found the scheme to be a lottery although no price was charged for the medals, Lord Alverstone stating (1 K. B. at 454):

If we look merely at the position of the holder of one of these medals, it is perfectly true that he may not have bought a copy of the newspaper; he may only know by oral information that he has won a prize. But the fact remains * * * that the scheme was devised by the proprietors to induce persons to inspect the paper * * * The case goes on to say that the proprietors' hope and intention in distributing the medals was that the recipients might be induced to purchase copies of the paper; that the scheme had been successful; that the objects the proprietors had in view had been attained in a steadily increasing manner; and that the circulation of the paper had increased by about 20 per cent. during the progress of the scheme.

It is submitted that the opinion of Judge Clark and the other authorities discussed above reflect

the correct view with respect to the role of consideration in lotteries. We recognize that the mechanical and rigid test of a money payment by the participant has been applied by courts other than the court below. But we believe that an examination of the cases applying such a standard demonstrates that they have done so quite uncritically, or as a result of the compulsion of statutes in terms requiring a valuable consideration.

The *only* decision of a Federal court relied on by the majority below for the principle that a "price" must be paid is *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.). There, a district court, in construing a Postal Bulletin requiring "an expenditure of substantial effort or time," found that looking into store windows to find a number entitling the window-shopper to a prize was not consideration. This decision is not only in conflict with what we believe to be the sounder view, but adopted a principle not advocated by the majority below or any of the appellees, *i. e.*, that lottery consideration consists of a "contribution in kind to the fund or property to be distributed." The case was never considered on the merits by the Court of Appeals.³⁸ Of the other

³⁸ A stay pending appeal was denied by the court of appeals after a brief hearing on the motions calendar, Judge Clark dissenting (192 F. 2d 240 (C. A. 2)), and the appeal was subsequently not pursued. See 104 F. Supp. 235.

nine decisions relied upon by the majority below, five³⁹ involved state statutes in terms requiring a valuable consideration or monetary payment.⁴⁰ And in one of them, *State of Kansas ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929, the court emphasized the particular language of the statute involved.

The other four cases relied upon below are *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Texas Civ. App.); *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782; *State v. Big Chief Corp.*, 64 R. I. 448, 13 A. 2d 236; and *Commonwealth v. Wall*, 295 Mass. 70, 3 N. E. 2d 28. In one of these, *State v. Big Chief Corp.*, *supra*, the court ruled that it need not decide the crucial question because there was no evidence that people had been brought to make purchases by their desire to participate in the drawing. The three remaining cases are part of a tightly inbred line which stems from *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338. This case, decided in 1890,

³⁹ *People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, *aff'd*, 273 N. Y. 475, 6 N. E. 2d 410; *People v. Burns*, 304 N. Y. 380, 107 N. E. 2d 498; *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689; *People v. Cardas*, 137 Cal. App. 788, 28 P. 2d 99; *State of Kansas ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929).

⁴⁰ But see *People v. Miller*, 271 N. Y. 44, 2 N. E. 2d 38, sustaining a Bank Night lottery conviction on the ground that the trial court had rejected the credibility of evidence of free participation, and confirming that there is a lottery even if the consideration is only 1 cent.

was apparently the first in which it was held that a valuable consideration is indispensable.

In the *Yellow-Stone Kit* case, the defendant, who gave performances consisting of music, dancing, acrobatics and exhibitions of a magic lantern, at which he sold medicines, was indicted for conducting a lottery. At the closing performance, conducted in a tent accommodating about 2,500 persons, with seats for about 1,000, prizes were distributed by lot. The admission fee was 10¢. Tickets for the chances had been distributed at previous performances (where the only fee was for a seat) and the doors were thrown open for free admission at the time of the drawing. It was not necessary to be present to win one of the prizes. The court held that "The suspicion, even though well founded, that these presents may have been given away in order to induce a large crowd to assemble at the defendant's performances, with the expectation that they would buy medicines, or pay a fee for occupying a seat in the tent, would be too remote to constitute a legal consideration for the tickets" (88 Ala. 201, 7 So. 339).

For its requirement of a valuable consideration the court relied upon a number of earlier cases mentioning valuable consideration, though not holding it to be a *sine qua non*. See, e. g. *Governors v. Art Union*, 7 N. Y. 228 (under a N. Y. statute requiring a valuable consideration); *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723; *Bell v.*

State, 37 Tenn. (5 Sneed) 507; *Buckalew v. The State*, 62 Ala. 334. It stated that a gratuitous distribution not designed to evade the law was proper, and reasoned further from the propriety of determining rights by lot," arguing that these were not the evils against which the law was directed. The court conceded that (88 Ala. at 200, 7 So. at 339) :

* * * the courts have shown a general disposition to bring within the term "lottery" every species of gaming, involving a distribution of prizes by lot or chance, and which comes within the mischief to be remedied, * * *

but refused to follow its own recognition of this principle, because of the absence of a valuable consideration.

The minority *Bank Night* cases and others which insist upon a valuable consideration stem directly from *Yellow-Stone Kit v. State*. In addition to those cited by the majority below, might be added: *Albert Lea Amusement Co. v. Hanson* 231 Minn. 401, 43 N. W. 2d 249; *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608 (of which the Supreme Court of Iowa recently said, "we are not prepared to say we would affirm the *Hundling* case," *State v. Mabrey*, 56 N. W. 2d 888, 892); *State v.*

⁴¹ Thus the court mentioned that under the law of the State a tie vote would result in choosing State officers by lot. This of course bears no resemblance to profiting from the cupidity of others.

Eames, 87 N. H. 477, 183 A. 590 (under a statute requiring payment); *Cross v. The People*, 18 Colo. 321; *Affiliated Enterprises, Inc. v. Gruber*, 86 F. 2d 958 (C. A. 1); *Chancy Park Land Co. v. Hart*, 104 Iowa 592, 73 N. W. 1059; *Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.).⁴² In *State v. Eames*, 87 N. H. 477,

⁴² The cross-citations in these cases leading back to *Yellow-Stone Kit v. State*, are of interest. The *Chancy Park*, *Hundling*, *Griffith Amusement Co.*, *Cross*, *Wall*, and *Eames* cases all cite *Yellow-Stone Kit*. *People v. Cardas* cites *Cross v. The People*. The *Gruber* case follows the *Eames*, *Wall* and *Hundling* cases. The *Hundling* case cites, in addition to *Yellow-Stone Kit*, *Cross* and *Cardas*. The *Eames* case cites, in addition to *Yellow-Stone Kit*, *Cardas* and *Cross*. *Chancy Park* also cites *Cross v. The People*. The *Rock-Ola* case follows *Cardas*, *Hundling*, *Eames*, and *Wall*. *Commonwealth v. Wall* follows *Eames*, *Chancy Park*, and *Hull v. Ruggles*, 56 N. Y. 424, in addition to *Yellow-Stone Kit*. And *Griffith Amusement Co.* also follows *Cross*, *Hundling*, *Cardas* and *Eames*. The *Eames* and *Hundling* cases for good measure also rely on *People v. Mail & Express*, 179 N. Y. S. 640, affd., 231 N. Y. 586, 132 N. E. 898, and the *Rock-Ola* case on *People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, affd., 273 N. Y. 475, 6 N. E. 2d 410, N. Y. cases where the statute requires a valuable consideration.

Finally, *Post Publishing Co. v. Murray*, 230 Fed. 773 (C. A. 1), cert. den., 241 U. S. 675, should be added. In that case, a newspaper published headless photographs of women shoppers, who might, upon identifying themselves, come to the newspaper and receive \$5. The court somewhat casually dismissed the scheme as playful. It found little or no chance, and no intent to induce members of the public into buying anything, which it stated to be the critical element, although the circulation of the paper might be increased. Obviously,

183 A. 590, a bastion of the line, the court was careful to point out that the particular statute involved required a valuable consideration and that cases under broader statutes were to be distinguished. But this case was nevertheless uncritically followed as a general statement of the law. A number of the cases, including *Yellow-Stone Kit v. The State*, *supra*, recognized that the essential difference between a lottery and a non-lottery was whether the scheme was a gratuitous offering, but failed to look at the scheme itself to see whether a true gift was involved. See, e. g., *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *Cross v. The People*, 18 Colo. 321.

Thus, aside from the decisions in those states, such as New York and California, which have statutes in terms requiring a valuable or pecuniary consideration, the line of cases applying this requirement as a general principle of law go back to the Alabama case of *Yellow-Stone Kit v. State*, *supra*, and frequently follow cases construing dissimilar statutes without discrimination. See *State ex rel. Draper v. Lynch*, 192 Okla. 497, 137 P. 2d 949, discussing the authorities. Even in Alabama, however, Bank Night has since been held to a lottery under a broad statute⁴³ similar to Section 1304, on

the schemes to which the Commission's rules apply are designed to induce the "give-away" program listeners to buy the products advertised over those programs.

⁴³ The Alabama statute forbids "any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise." Code 1923, § 4247.

the theory that the plan was intended to fill the theater. *Grimes v. State*, 235 Ala. 192, 178 So. 73.

Congress has wisely not attempted a limiting definition of lotteries and similar schemes. It did not limit the proscription of Section 1304 to the precise forms lotteries had thus far taken, but specifically included all similar schemes which provoke the same mischief. The language of the law—"lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance"—aptly fulfills its purpose of keeping pace with all schemes "savoring of a lottery."⁴ There is thus no question here of expanding the statutory language to include schemes that previously were not included. It may not be practically possible to write a comprehensive detailed definition which will spell out the multitudinous forms lotteries have been and will be given.⁵ But this does not mean that the statute is deprived of force with respect to new schemes conceived after its enactment, but within its principles. The fact that a particular scheme may

⁴ See S. Rep. 10 Part 1, on S. 2982, 60th Cong., 1st Sess., p. 22, referring to the revision and consolidation of the Penal Code in 1909 "so as to bring within the operation of the section all schemes savoring of a lottery." The section referred to (214) contained the language of 18 U. S. C. 1304.

⁵ See *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320; *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 8 N. E. 2d 648; *State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547; *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340, on the futility of over-precise legislative definition.

be novel, and have come into existence after the enactment of the governing statute, does not put it beyond the reach of the law." And as was said by this Court of the term "unfair competition," "Neither the language nor the history of the [Federal Trade Commission] Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *Federal Trade Commission v. Keppel*, 291 U. S. 304, 310.

Consideration is not in terms a requisite of a lottery or similar scheme under Section 1304. To the extent that it has become a recognized element in such schemes, it is fully satisfied by the Commission's carefully drawn rules. The rules at issue proscribe only those schemes which are designed to "buy" a radio or television audience with the lure of prizes distributed by chance. The consideration received by the promoter of such schemes is obvious; the consideration supplied through the time and effort "of the partici-

* *United States v. Jefferson*, 134 F. 299 (C. C., W. D. Ky.); *Seidenbender v. Charles*, 4 Sergeant & Rawle 151, 8 Am. Dec. 682; *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N. E. 2d 207; *State ex. rel. Evans v. Brotherhood of Friends*, 41 Wash. 2d 133, 247 P. 2d 787.

⁴⁷ Judge Clark pointed out that in the aggregate the time required of participants in give-away schemes is considerable in quantity, and extremely valuable to the station and program sponsor (R. 134):

"What they [station and sponsor] are doing is to purchase time to advertise and vend their wares—indeed the most valuable time conceivable, as is alleged in the papers before us and conceded by all. The time spent by a single listener

pants and the eventual purchase by them of the sponsor's product may be less obvious. It is no less real.

The view reflected in the Commission's rules with respect to the element of consideration in lotteries and similar schemes was cogently stated over 50 years ago by Judge John L. Thomas, a former Assistant Attorney General for the Post Office Department in his authoritative treatise on lotteries:

The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or

may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provides so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting moments will not be adequate to learn what the rules are, hear and guess the tune or the answer to the question, and accept and answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as part of the game until the announcer calls."

inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes. [Lotteries, Frauds, and Obscenity in the Mails, p. 35.] *

Appellees may urge that 18 U. S. C. 1304 should be given the most restrictive possible interpretation because it is a criminal statute. Whatever the relevance of the strict construction doctrine where, as here, the statute is not being invoked with criminal sanctions in view, it is clear that the doctrine cannot be used to vitiate an intention of Congress to secure broad coverage where such an intention is clearly expressed.* It is hard to

* And there has been no significant departure from this position by the Post Office Department to this day. The most recent Postal Bulletin on the subject declares that there is adequate consideration in "an expenditure of substantial effort or time," and limits this principle only as it is cast in doubt by the decision here under appeal and by *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.). Excerpt from Postal Bulletin No. 19642, June 4, 1953, Appendix C, p. 76.

* *United States v. Halseth*, 342 U. S. 277, relied upon by the majority below (R. 124), is not in point here. It was there held that certain paraphernalia which had been sent through the mails was not part of an existing lottery, although it might later be so used. There is no such defect here. The radio give-away schemes are presently existing lotteries which are consummated during the programs.

see how Congress could have manifested such an intention more clearly than by the use of the term "other similar schemes". The recent decision of this Court in *United States v. Alpers*, 338 U. S. 680, is closely in point. In construing a similar comprehensive phrase in an obscenity statute ("or other matter of indecent character"), the Court quoted with approval the statement in *Gooch v. United States*, 297 U. S. 124, 128, that "while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." And see *Northern Securities Co. v. United States*, 193 U. S. 197; *Kordel v. United States*, 335 U. S. 345.

It may also be urged that the Commission's rules represent an improper attempt to control what programs the public is to hear or see, that the Commission has no justification for imposing its views on this field on either broadcasters or the listening public, and that there is no occasion to "protect" the people from themselves. The difficulty with that line of argument is that it goes to the heart of anti-lottery legislation; it is a criticism properly directed to 18 U. S. C. 1304, rather than to the Commission's rules. The Congress has made the judgment—whether rightly or wrongly—that lotteries and similar schemes should not be broadcast. That policy must be fully and fairly carried out until and unless the

Congress alters it. As Judge Clark aptly stated (R. 135-136):

If people want to waste their time in listening to radio programs in the hope or off-chance of winning some valuable prizes, why not let them do it. That is a widespread attitude with which, of course, I have considerable sympathy. But I think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unliked, prohibition into one which is unintelligible.

It is respectfully submitted that the judgment below does, indeed, make unintelligible the existing law against the broadcast of lotteries and other similar schemes. That judgment should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed insofar as it enjoins enforcement of portions of the Commission's rules. The cases should be remanded to that court with directions to dismiss the complaints.

Respectfully submitted.

ml WARREN E. BAKER,
General Counsel,

✓ J. ROGER WOLLENBERG,
Assistant General Counsel,

✓ DANIEL R. OHLBAUM,

ml ERICH SAXI,

Counsel,

Federal Communications Commission.

JANUARY 11, 1954.

APPENDIX A

The following is believed to be a substantially complete list of the anti-lottery provisions contained in the Constitutions of the States and in the Statutes of the States and Territories.

I. CONSTITUTIONS

Alabama—Section 65 of the Constitution of Alabama.

Arkansas—Article XIX, section 14 of the Constitution of Arkansas.

California—Article IV, section 26 of the Constitution of California.

Colorado—Article XVIII, section 2 of the Constitution of Colorado.

Delaware—Article II, section 17 of the Constitution of Delaware.

Florida—Article III, section 23 of the Constitution of Florida.

Georgia—Article II, section 204 of the Constitution of Georgia.

Idaho—Article III, section 20 of the Constitution of Idaho.

Illinois—Article IV, section 27 of the Constitution of Illinois.

Indiana—Article XV, section 8 of the Constitution of Indiana.

Iowa—Article III, section 28 of the Constitution of Iowa.

Kansas—Article XV, section 3 of the Constitution of Kansas.

- Kentucky*—Section 226 of the Constitution of Kentucky.
- Louisiana*—Article XIX, section 8 of the Constitution of Louisiana.
- Maryland*—Article III, section 36 of the Constitution of Maryland.
- Michigan*—Article V, section 33 of the Constitution of Michigan.
- Minnesota*—Article IV, section 31 of the Constitution of Minnesota.
- Mississippi*—Article IV, section 98 of the Constitution of Mississippi.
- Missouri*—Article XIV, section 10 of the Constitution of Missouri.
- Montana*—Article XIX, section 2 of the Constitution of Montana.
- Nebraska*—Article III, section 24 of the Constitution of Nebraska.
- Nevada*—Article IV, section 24 of the Constitution of Nevada.
- New Jersey*—Article IV, section 7, paragraph 2 of the Constitution of New Jersey.
- New York*—Article I, section 9 of the Constitution of New York.
- North Dakota*—Article I, Amendments to Constitution of North Dakota.
- Ohio*—Article XV, section 6 of the Constitution of Ohio.
- Oregon*—Article XV, section 4 of the Constitution of Oregon.
- Rhode Island*—Article IV, section 12 of the Constitution of Rhode Island.
- South Carolina*—Article XVII, section 7 of the Constitution of South Carolina.

South Dakota—Article III, section 25 of the Constitution of South Dakota.

Tennessee—Article XI, section 5 of the Constitution of Tennessee.

Texas—Article III, section 47 of the Constitution of Texas.

Utah—Article VI, section 28 of the Constitution of Utah.

Virginia—Article IV, section 60 of the Constitution of Virginia.

Washington—Article II, section 24 of the Constitution of Washington.

West Virginia—Article VI, section 36 of the Constitution of West Virginia.

Wisconsin—Article IV, section 24 of the Constitution of Wisconsin.

II. STATUTES

Alabama—The Code of Alabama 1941, Title 14, secs. 275-282.

Alaska—48 U. S. C., 77. Comp. Laws of Alaska 1949, pars. 4-2-1; 65-13-1 et seq.

Arizona—Code 1939, Title 43-2706.

Arkansas—Arkansas Stat. 1947. 41-2024; 41-2029.

California—Penal Code 1941, secs. 319 et seq.

Canal Zone—Crim. Code, sec. 471.

Colorado—1935 Stat. Ann., ch. 104, secs. 1 et seq.

Connecticut—The General Stat. of Connecticut. Revision of 1949, secs. 8667 et seq.

Delaware—Delaware Code Ann., Title 11, secs. 661 et seq.

District of Columbia—District of Columbia Code (Ann.), 1951 Ed. Secs. 22-1501 et seq.

- Florida*—Florida Stat. Ann., secs. 849.09 et seq.
- Georgia*—Code of Georgia Ann., secs. 26.6501 et seq.
- Hawaii*—48 U. S. C. 562. Organic Act, sec. 55.
Rev. Laws of Hawai, 1945. Secs. 11.340-2;
11.349.
- Idaho*—Idaho Code. Ch. 49, secs. 18-4901 et seq.
- Illinois*—Smith-Hurd Ill. Ann. Stat. ch. 38, secs.
406 et seq.
- Indiana*—Stat. 1933, secs. 10-2301 et seq.
- Iowa*—Iowa Code Ann. 726.41 et seq.
- Kansas*—General Stat. of Kansas Ann. 1949, secs.
21.1501 et seq.
- Kentucky*—Kentucky Rev. Stat. 1953. Secs.
436.360 et seq.; 436.420.
- Louisiana*—Louisiana Rev. Stat. of 1950, secs.
740-90.
- Maine*—Rev. Stat. 1944, ch. 126, secs. 18-20 et seq.
- Maryland*—The Ann. Code of Maryland. Art. 27,
sec. 423 et seq.
- Massachusetts*—General Laws of Massachusetts
1932, ch. 271, sec. 7 et seq.
- Michigan*—Michigan Stat. Ann. Secs. 28: 604 et
seq.
- Minnesota*—Stat. Ann. Secs. 614.01 et seq.
- Mississippi*—Mississippi Code 1942. Secs. 2270
et seq.
- Missouri*—Rev. Stat. Ann. Sec. 4704 et seq.
- Montana*—Rev. Code of Montana. 1947 Ann.
Secs. 94.3001 et seq.
- Nebraska*—Rev. Stat. of Nebraska, secs. 28.961
et seq.
- Nevada*—Nevada Comp. Laws. Secs. 10176 et seq.
- New Hampshire*—Rev. Laws of 1942, ch. 47, secs.
1 et seq.

- New Jersey*—New Jersey Stat. Ann. Secs. 121-1; 2: 147-1 et seq.
- New Mexico*—New Mexico Stat. 1941, secs. 41-2213 et seq.
- New York*—McKinney's Cons. Laws of New York 1951, Penal Law, secs. 1370 et seq.
- North Carolina*—The General Stat. of North Carolina of 1943, secs. 14.289 et seq.
- North Dakota*—North Dakota Rev. Code of 1943, secs. 12.2401 et seq.
- Ohio*—Page's Ohio General Code Ann., secs. 13063 et seq.
- Oklahoma*—Stat. Ann. 1938, Title 21, secs. 1051 et seq.
- Oregon*—Oregon Comp. Laws Ann., 23-1001 et seq.
- Pennsylvania*—Purdon's Pennsylvania Stat. Ann., 18.4601 et seq.
- Rhode Island*—General Laws 1938, ch. 612, secs. 1 et seq.
- South Carolina*—Code of Laws of South Carolina 1952, secs. 16.501 et seq.
- South Dakota*—South Dakota Code of 1939, secs. 24.0201 et seq.; 24.9906 et seq.
- Tennessee*—Ann. Code of Tennessee 1934, secs. 11.302 et seq.
- Texas*—Vernon's Ann. Stat. of the State of Texas Penal Code, secs. 654 et seq.
- Utah*—Code Ann. 1953, secs. 76-27-9 et seq.
- Vermont*—The Vermont Stat. Revision of 1947, secs. 8545 et seq.
- Virginia*—Code of Virginia 1950, secs. 18-276; 18-301 et seq.; 19-11.

Washington—Rev. Code of 1952, sec. 9.59.010 et seq.

West Virginia—The West Virginia Code of 1949, secs. 6104 et seq.

Wisconsin—Stat. 1951. Secs. 348.01 et seq.

Wyoming—Wyoming Comp. Stat. Ann., secs. 9.815 et seq.

APPENDIX B

DECISIONS OF STATE COURTS ON THE LEGALITY OF BANK NIGHT TYPE SCHEMES

1. DECISIONS HOLDING BANK NIGHT AND KINDRED SCHEMES ILLEGAL

Alabama—*Grimes v. State*, 235 Ala. 192, 178 So. 73.

Connecticut—*State v. Dorau*, 124 Conn. 160, 198 A. 573.

Delaware—*Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5A. 2d 257.

Florida—*Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854, 185 So. 855.

Georgia—*Jorman v. State*, 54 Ga. App. 738, 188 S. E. 925; *Barker v. State*, 56 Ga. App. 705, 193 S. E. 605.

Illinois—*Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 8 N. E. 2d 648.

Kansas—*State ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929.

Louisiana—*Shanchell v. Lewis Amusement Co.*, 171 So. 426.

Massachusetts¹—*Commonwealth v. Wall*, 295 Mass. 70, 3 N. E. 2d 28; *Commonwealth v. Heffner*, 304 Mass. 521, 24 N. E. 2d 508; *Commonwealth v. McLaughlin*, 307 Mass. 230, 29 N. E. 2d 821.

¹ Under the Massachusetts rule, determination of the fact question of whether the chance is paid for remains open in each case.

- Michigan—*Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.*, 276 Mich. 127, 267 N. W. 602; *United-Detroit Theatres Corp. v. Colonial Theatrical Enterprise, Inc.*, 280 Mich. 425, 273 N. W. 756.
- Minnesota—*State v. Schubert Theatre Players Co.*, 203 Minn. 366, 281 N. W. 369.
- Missouri—*State v. McEwan*, 343 Mo. 213, 120 S. W. 2d 1098.
- Montana—*State ex rel. Dussault v. Fox Missoula Theatre Corp.*, 110 Mont 441, 101 P. 2d 1065.
- Nebraska—*State ex rel. Hunter v. Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605; *State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547.
- New Jersey—*Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892.
- New Mexico—*State v. Jones*, 44 N. M. 623, 107 P. 2d 324.
- New York—*People v. Miller*, 271 N. Y. 44, 2 N. E. 2d 38.
- Ohio—*Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N. E. 2d 207, *affd.* 137 Ohio St. 460, 30 N. E. 2d 799.
- Oklahoma—*State ex rel. Draper v. Lynch*, 192 Okla. 497, 137 P. 2d 949.
- Oregon—*McFadden v. Bain*, 162 Ore. 250, 91 P. 2d 292.
- Pennsylvania—*Commonwealth v. Lund*, 142 Pa. Super. 208, 15 A. 2d 839, *allocatur refused* 142 Pa. Super. xxxi.
- Texas—*City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 100 S. W. 2d 695; *State v. Robb & Rowley United*, 118 S. W. 2d 917 (Civil App.); *Cole v. State*, 133 Tex. Cr. R. 548, 112 S. W. 2d 725.

Vermont—*State v. Wilson*, 109 Vt. 349, 196 Atl. 757.

Washington—*State v. Danz*, 140 Wash. 546, 250 Pac. 37; *Society Theatre v. Seattle*, 118 Wash. 258, 203 Pac. 21.

West Virginia—*State v. Greater Huntington Theatre Corp.*, 133 W. Va. 252, 55 S. E. 2d 681.

Wisconsin—*State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N. W. 707; *Stern v. Miller*, 239 Wis. 41, 300 N. W. 738.

2. DECISIONS HOLDING BANK NIGHT AND KINDRED SCHEMES LEGAL

California—*People v. Cardas*, 137 Cal. App. 788, 28 P. 2d 99.

Florida—*Dorman v. Publix-Saenger-Sparks Theatres, Inc.*, 135 Fla. 284, 184 So. 886.²

Iowa—*State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *St. Peter v. Pioneer Theatre Corp.*, 227 Iowa 1391, 291 N. W. 164.

Minnesota—*Albert Lea Amusement Corp. v. Hanson*, 231 Minn. 401, 43 N. W. 2d 249.³

New Hampshire—*State v. Eames*, 87 N. H. 477, 183 Atl. 590.

² This case, decided before *Little River Theatre Corp. v. State ex rel. Hodge*, *supra*, held that there was no lottery under the particular facts in the declaration.

³ This case appears to be irreconcilable with *State v. Schubert Theatre Players Co.*, *supra*, although the earlier decision was not overruled.

New York—*People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, *affd.*, 273 N. Y. 475, 6 N. E. 2d 410; *Simmons v. Randforce Amusement Corp.*, 162 Misc. 491, 293 N. Y. S. 745.⁴

Rhode Island—*State v. Big Chief Corp.*, 64 R. I. 448, 13 A. 2d 236.⁵

South Carolina—*Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782.

Tennessee—*State ex rel. District Atty. Gen. v. Crescent Amusement Co.*, 170 Tenn. 351, 95 S. W. 2d 310.

Texas—*Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Tex. Civ. App.).⁶

⁴ But see *People v. Miller*, *supra*, holding Bank Night illegal where evidence of free participation was rejected by the trial court on grounds of credibility.

⁵ A decision failing to determine the applicable legal test because of inadequate facts in the record.

⁶ This decision appears to be inconsistent with the other Texas decisions holding Bank Night illegal.

APPENDIX C

Excerpt From Postal Bulletin No. 19642, of June
4, 1953

INSTRUCTIONS OF THE SOLICITOR

RULINGS ON LOTTERIES, GIFT ENTERPRISES, ETC.

In the Postal Bulletin of February 13, 1947, the following statement was made of the position of the Office of the Solicitor respecting the element of consideration in a lottery:

“In order for a prize scheme to be held in violation of this section (36.6, P. L. & R., 1948), it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the ‘consideration’ involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one’s name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.”

There have been two recent decisions in the Federal courts dealing with the question of consideration in a lottery: *Garden City Chamber of Commerce v. Wagner*, 100 Fed. Sapp. 769, wherein it was held that a requirement that participant visit a number of stores to determine if his number is posted in one of the store windows, thereby entitling him to a prize, does not constitute a con-

sideration for a prize, and that such a scheme is therefore not a lottery; *American Broadcasting Co., Inc., et al. v. Federal Communications Commission*, 110 Fed. Supp. 374, dealing principally with requirements of listening to the radio or watching television programs.

This office will continue to hold that the element of consideration is present in a prize scheme when a substantial expenditure of time and effort is involved. However, in view of the court decisions referred to, this office must reverse its rulings which have held consideration to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc.

Postmasters should therefore exercise caution in applying previous rulings of this office in prize plans involving consideration only in "time and effort" expended. If there is doubt with respect to any of these questions, the matter should be submitted to the Solicitor so that a definite ruling may be made thereon.

INDEX

	Page
I. The Commission's Authority to Promulgate Lottery Rules.....	4
A. The Commission has a duty to consider violations of 18 U. S. C. 1304.....	5
B. No censorship or abridgment of free speech is involved.....	12
II. The Legality of the Rules.....	16
A. The rules are rested upon 18 U. S. C. 1304 in its entirety.....	16
B. 18 U. S. C. 1304 is constitutional as interpreted in the rules.....	18
C. The Post Office Department has not adopted a monetary test of lottery consideration.....	20
III. The Application of the Rules.....	23
Conclusion.....	28

CITATIONS

Cases:

<i>Affiliated Enterprises, Inc. v. Waller</i> , 40 Del. 28, 5 A 2d 257..	3
<i>Bay State Beacon, Inc. v. Federal Communications Commission</i> , 171 F. 2d 826.....	15
<i>Carolene Products Co. v. United States</i> , 323 U. S. 18.....	19
<i>Donaldson v. Read Magazine</i> , 333 U. S. 178.....	12
<i>Duncan v. United States</i> , 48 F. 2d 128, cert. den. 283 U. S. 863.....	12
<i>Ex parte Jackson</i> , 96 U. S. 727.....	12
<i>Federal Communications Commission v. WOKO, Inc.</i> , 329 U. S. 223.....	5
<i>Federal Trade Commission v. Keppel & Bro.</i> , 291 U. S. 304..	13
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, 192 F. 2d 240, 104 F. Supp. 235.....	22
<i>Giboney v. Empire Storage Co.</i> , 336 U. S. 490.....	12
<i>Hannegan v. Esquire, Inc.</i> , 327 U. S. 146.....	15, 16
<i>Hebe Co. v. Shaw</i> , 248 U. S. 297.....	23
<i>Helvering v. Mitchell</i> , 303 U. S. 391.....	5
<i>Independent Broadcasting Co. v. Federal Communications Commission</i> , 193 F. 2d 900, cert. den. 344 U. S. 837.....	15
<i>In re Rapier</i> , 143 U. S. 110.....	12
<i>Johnston Broadcasting Co. v. Federal Communications Commission</i> , 175 F. 2d 351.....	15

II

Cases—Continued

	Page
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U. S. 495.....	16
<i>KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission</i> , 47 F. 2d 670.....	15
<i>Lemicux v. Young, Trustee</i> , 211 U. S. 489.....	23
<i>Lottery case</i> , 188 U. S. 321.....	12
<i>Mansfield Journal Company v. Federal Communications Commission</i> , 180 F. 2d 28.....	6, 9, 10
<i>McLean Trucking Company v. United States</i> , 321 U. S. 67..	7
<i>Mester v. United States</i> , 70 F. Supp. 118, <i>aff'd</i> . 332 U. S. 749.....	9, 10
<i>National Broadcasting Co. v. United States</i> , 319 U. S. 190..	5,
8, 10, 11, 14	
<i>Near v. Minnesota</i> , 283 U. S. 697.....	13
<i>Public Clearing House v. Coyne</i> , 194 U. S. 497.....	7, 12, 13, 16
<i>Rast v. Van Deman & Lewis</i> , 240 U. S. 342.....	20
<i>Simmons v. Federal Communications Commission</i> , 169 F. 2d 670, <i>cert. den.</i> 335 U. S. 846.....	15
<i>Southern S. S. Co. v. Labor Board</i> , 316 U. S. 31.....	6, 7, 10
<i>Steuart & Bros. v. Bowles</i> , 322 U. S. 398.....	5
<i>Superior Films, Inc. v. Department of Education</i> , — U. S. —, 22 U. S. Law Week 3193 (1954).....	16
<i>Trinity Methodist Church v. Federal Radio Commission</i> , 62 F. 2d 850, <i>cert. den.</i> 284 U. S. 685.....	15
<i>United States v. Halseth</i> , 342 U. S. 277.....	22
<i>United States v. Sullivan</i> , 332 U. S. 689.....	23

Statutes:

Constitution of the United States:

First Amendment.....	4, 12, 13
Fifth Amendment.....	8

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151 *et seq.*:

Section 309.....	27
Section 311.....	9
Section 313.....	9
Section 326.....	4, 5, 12, 14
Section 501.....	11
Section 502.....	11

Title 18, U. S. Code:

Section 1304.....	2, 3, 4, 5, 6, 8, 10, 11, 13, 16, 17, 18, 20, 22
Section 1343.....	13
Section 1464.....	13

Miscellaneous:

Postal Bulletin No. 19642, June 4, 1953.....	22
Rules and Regulations of Federal Communications Commission:	
Section 3.503.....	24
Section 3.621.....	24

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

This is a case of first impression in this Court. A plethora of lower court cases have been cited by all parties. But the conflicting doctrines there set forth were adopted against a background of

differing statutes and differing factual situations. These authorities are helpful, but there remains for decision the precise application of a particular federal statute—18 U. S. C. 1304—to the particular ingenious “giveaway” programs covered by the Commission’s rules.

It is submitted that both on principle and under the rationale of the better reasoned cases any requirement of consideration for a lottery or similar scheme is fully satisfied in the schemes covered by the Commission’s rules.

Appellees’ contention that there is no consideration here leads to patent absurdity. As Judge Clark, dissenting below, said (R. 134):

What they [broadcasters and sponsors] are doing is to purchase time to advertise and vend their wares—indeed the most valuable time conceivable, as is alleged in the papers before us and conceded by all. The time spent by a single listener may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provides so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting

moments will not be adequate to learn what the rules are, hear and guess the tune or the answer to the question, and accept and answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as a part of the game until the announcer calls.

To admit that a radio station and its advertisers obtain something valuable by "buying" an audience, but that the audience collectively has not given anything valuable, merely because its members or some of them did not pay a penny or a box top, is unrealistic in the extreme.¹

Appellant's opening brief explored in detail the bases for the Commission's interpretation of 18 U. S. C. 1304 here challenged. While we do not agree with appellees' characterizations of

¹ The same type of unrealistic argument which is urged by appellees here was rejected with respect to a Bank Night scheme in the following colorful language (*Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 36, 5 A. 2d 257, 260) :

"Motion picture theatres are not charitable enterprises. In holding out offers of an award of the kind and in the manner disclosed by the contract, they are not moved by a spirit of brotherly love, sympathy for the poor to the end that they may enjoy a more abundant life, or warmth of heart in any degree. With them it is a coldblooded business device, embraced with hope and expectancy of filling their theatres with paying patrons. They proceed upon the notorious fact that there is nascent in the human breast a gambling instinct; that the average human is avid of an opportunity to gain much at a small risk; and that this instinct and passion is likely to blossom upon slight nourishment."

many of the authorities upon which we relied, or of the additional ones cited by them, we believe that neither time nor reasonable limitation of space permits further discussion of lottery cases generally. The present brief will be confined to a short discussion of certain points stressed by appellees, especially those relating to the Commission's general authority to promulgate rules with respect to the broadcast of lotteries. The Commission's authority to adopt such rules having been unanimously sustained by the court below, and no appeal having been taken by appellees, discussion of this question was deemed unnecessary in our opening brief.

I

THE COMMISSION'S AUTHORITY TO PROMULGATE LOTTERY RULES

The district court held without dissent that the Commission's licensing and rule making powers conferred ample authority to refuse licenses to those who violate 18 U. S. C. 1304 (R. 122-3), and that the exercise of this authority does not constitute censorship in violation of Section 326 of the Communications Act of 1934, as amended, or an interference with the right of free speech guaranteed by the First Amendment, where applied to programs which violate the criminal law (R. 129). Although no appeal has been taken from these rulings, the argument has been renewed by appellees ABC and NBC that Section

326 prohibits any action by the Commission with respect to specific programs (ABC Br. 57-62; NBC Br. 49-53), and that Section 1304 provides no basis for Commission jurisdiction (ABC Br. 61; NBC Br. 53-54). Both arguments are, as the district court held, without merit.

A. THE COMMISSION HAS A DUTY TO CONSIDER
VIOLATIONS OF 18 U. S. C. 1304

The argument of appellees NBC (Br. 53-54) and ABC (Br. 61) addressed to the Commission's authority challenges such authority primarily on the ground that there is involved the imposition of a penalty without a criminal conviction. But, as the court below held (R. 131), denial of a license because of continued violations of Section 1304 is clearly not subject to attack as an attempt by the Commission to alter or add to the criminal penalty provided by Congress in that statute. Denial of a license privilege is not a punitive sanction. *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223; *Helvering v. Mitchell*, 303 U. S. 391; *Steuart & Bros. v. Bowles*, 322 U. S. 398, 404-407. And the courts have consistently rejected the curious theory that acts so seriously against public policy as to be declared criminal are, for that reason, immune from the consideration of an agency whose duty it is to grant licenses only to those who will use them in the public interest. *National Broadcasting Company, Inc. v. United States*, 319 U. S. 190;

Mansfield Journal Company v. Federal Communications Commission, 180 F. 2d 28 (C. A. D. C.).
Cf. Southern S. S. Co. v. Labor Board, 316 U. S. 31.

Cognizance by the Commission of Congressional policy set forth in statutes other than the Communications Act is not only lawful. It is indispensable if the Commission is to carry out its own statutory responsibilities. In determining whether an applicant's proposed or past operation meets the statutory standard of the public interest, convenience or necessity, the Commission has a duty to consider violations of a Federal statute which makes certain conduct by a licensee unlawful. This is especially the case where the particular statute in question does not merely affect broadcasters because they are persons (as, e. g., do statutes against fraud or embezzlement), but is applicable *only* to broadcasting, the very field in which the Commission has been entrusted with the primary regulatory authority.

If the Commission could not take account of violations of 18 U. S. C. 1304 in licensing proceedings, it would be in the position of granting licenses to those who engage in a type of broadcasting forbidden by law; it would, in effect, be required to aid and abet unlawful conduct.

The principle that the Commission may, and must, consider conduct of licensees of a character declared unlawful by Congress, without awaiting

convictions in criminal proceedings, is founded in precedent as well as logic.² The general problem of an agency's duties with respect to effectuating Congressional objectives found in other laws is treated in *Southern S. S. Co. v. Labor Board*, 316 U. S. 31. It was there held that the National Labor Relations Board had erred in ordering reinstatement of employees who had engaged in mutiny, although there had apparently been no prior conviction. The Court stated (p. 47):

It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.³

² It is too late to argue, in the face of *Public Clearing House v. Coyne*, 194 U. S. 497, 508, that due process of law is denied where reviewable administrative action determines the existence of a lottery. This is especially true where the rules will not even be placed in effect until their validity has been passed upon by this Court.

³ And see *McLean Trucking Company v. United States*, 321 U. S. 67.

That ruling directing the agency to consider an unconvicted violation of the criminal law is applicable *a fortiori* here. For the policies of the Communications Act and Section 1304 present no conflict requiring accommodation.* Section 1304 establishes one of the criteria of public interest with respect to broadcasting. The Communications Act provides for the licensing of broadcasters in the public interest.

The decision in *National Broadcasting Company v. United States*, 319 U. S. 190, where the Federal Communications Commission's Chain Broadcasting Regulations were sustained, is squarely in point here. The claim was made in that case that the Commission could not consider activities which

* As has been pointed out by the court below (R. 123): "Even though it may not be a function of the Commission to enforce the criminal law, the Commission would have the power to bar any applicant who violated the criminal law. Section 1304 of the United States Criminal Code is so closely identified with the field in which the Commission functions that at one time it was part (§ 316) of the Federal Communications Act. The 'public interest, convenience or necessity' standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding. Although Congress by a specific enactment authorized the Postmaster General to deny the use of the mails to lotteries and gambling schemes [39 U. S. C. § 259 and § 732; *Public Clearing House v. Coyne*, 194 U. S. 497], it was not necessary that Congress specifically authorize the Commission to take action against a broadcasting company which violated Section 1304 of the Criminal Code because the licensing power, specifically conferred on the Commission under Sections 303 and 309 of the Act, would include that authorization."

might constitute unconvicted violations of the antitrust laws since, under Section 311 of the Communications Act as it then read, the Commission was specifically authorized to refuse a license to anyone adjudged guilty of violating the antitrust laws. This Court unequivocally rejected this claim (319 U. S. at 223):

A licensee charged with practices in contravention of this standard [public interest, convenience or necessity] cannot continue to hold his license *merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted* * * * Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.⁵ [Emphasis added.]

Thus even where the statute (Section 311) created specific authority to act upon the basis of a criminal conviction, the Court refused to draw the inference that, absent such a conviction, the Commission was powerless to act. Accord: *Mansfield Journal Company v. Federal Communications Commission*, 180 F. 2d 28 (C. A. D. C.); *Mester v.*

⁵ That Section 313 of the Communications Act specifically provides that the antitrust laws shall be applicable to radio communications does not distinguish the present situation.

United States, 70 F. Supp. 118 (E. D. N. Y.),
aff'd 332 U. S. 749.*

The *National Broadcasting Company* and *Southern Steamship Company* cases, *supra*, have established the principle that an administrative agency must, in determining the public interest, consider the policy of other statutes as well as that of the one which it administers. Here the Commission is not purporting to apply or to extend the policy of 18 U. S. C. 1304 in another field; it is merely proposing to deny licenses to those who violate the statute. And to effectuate that licensing policy in a manner that will give full and fair warning to all, the Commission has described certain conduct which it believes to

* In the *Mansfield Journal Company* case, the Court sustained the Commission's denial of broadcast applications where actions taken by the applicant in the conduct of its newspaper business had the purpose of suppressing competition from a radio station and of securing a monopoly of mass advertising and news dissemination.

In the *Mester* case, the Commission had denied an application for transfer of control of Station WOV, where the proposed transferees had been involved in civil proceedings concerning false labeling, fraudulent advertising, and other deceptive practices they had engaged in as partners in the business of marketing edible oils. The Commission found they had manifested a flagrant disregard of government regulations designed for the protection of the public. A three-judge District Court affirmed the Commission's decision, specifically ruling that consideration of the necessary character qualifications of a licensee included consideration of his involvement in such civil litigation.

violate the statute. Under the *National Broadcasting Company* decision, the Commission, pursuant to its duty to consider the public interest, would be warranted in applying the policy of 18 U. S. C. 1304, whether or not the statute had been technically violated. The Commission has stopped short of such action. That the Commission has limited itself by utilizing less than its full policy-making power is hardly a ground for declaring that it has exceeded its powers.

If the Commission could not consider violations of law until they had been adjudicated in criminal proceedings, it would be unable to consider any violation of the Communications Act itself, or its own rules and regulations, since such violations have criminal penalties (Communications Act of 1934, as amended, Sections 501, 502, 47 U. S. C. 501, 502). It is clear that it was intended, as the courts have uniformly held, that conduct of licensees so seriously against public policy as to have been declared unlawful be deemed inconsistent with the public interest, convenience and necessity.

The district court clearly was right in holding that "The 'public interest, convenience or necessity' standard for the issuance of licenses to broadcasting companies would imply a requirement that the applicant be law-abiding" (R. 123).

B. NO CENSORSHIP OR ABRIDGMENT OF FREE SPEECH
IS INVOLVED

The argument that the rules constitute forbidden censorship under Section 326 or an abridgment of free speech under the First Amendment is essentially one that the Commission is powerless to refuse a license for the utilization of a scarce channel of interstate communication even if the applicant has regularly violated a valid criminal statute. This argument cannot be sustained. A lottery has long been considered criminal conduct in which the incidental use of speech is not protected by the First Amendment. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Lottery case*, 188 U. S. 321; *Public Clearing House v. Coyne*, 194 U. S. 497; *Donaldson v. Read Magazine*, 333 U. S. 178; *Duncan v. United States*, 48 F. 2d 128 (C. A. 9), *cert. den.* 283 U. S. 863.

On the question of speech as conduct, this Court recently said in a unanimous opinion:

It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, or written, or printed. [Emphasis added.] [*Giboney v. Empire Storage Co.*, 336 U. S. 490, 502.]

Appellees ABC and NBC apparently contend that although no violation of the First Amendment may be involved, any action by the Commission in refusing to renew a license, on the ground that it has been used to commit a crime, is an advance censorship which Congress intended to forbid. But the rules do not provide for any immediate prior restraint of particular programs, nor for the submission of individual programs for Commission approval before they are broadcast by a licensee. Broadcast licensees, acting at their peril, can broadcast any programs they wish, including those which violate the radio obscenity laws (18 U. S. C. 1464), the radio fraud law (18 U. S. C. 1343), the radio lottery law (18 U. S. C. 1304), or other more general criminal statutes. In doing so, the licensee of course risks criminal prosecution, and denial of a license renewal upon the expiration of his present license. This is subsequent responsibility, not prior restraint. *Cf. Near v. Minnesota*, 283 U. S. 697.⁷

The rules here set up no arbiter of controlled expression. The only licensing system involved is that provided by the Communications Act itself.

⁷ The inapplicability of the doctrine of *Near v. Minnesota* in the similar situations involving denial of use of the mails, and the issuance of cease and desist orders concerning use of instrumentalities of interstate commerce for lotteries, is made clear by *Public Clearing House v. Coyne*, 194 U. S. 497, and *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304.

Appellees stop short of asserting at this late date that the licensing system established by the Communications Act is unconstitutional. As an original and highly theoretical proposition, it might be argued that *any* denial of a broadcast license is a "previous restraint" on speech. But this Court has held to the contrary. In *National Broadcasting Company v. United States*, 319 U. S. 190, the Court held that radio is a field of scarcity which is subject to reasonable regulations, through licensing, in the public interest. And, with respect to the free speech argument, the Court said (p. 227):

The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

The censorship provision of Section 326 is plainly inapplicable here. Censorship is the day-to-day control of program content. It is not the denial of scarce broadcast frequencies to those who regularly violate a valid criminal statute. It has been held in every relevant case that the responsibility of the Commission to grant licenses in the public interest embraces a duty to consider the use to which such licenses are put.

In *Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351, 359 (C. A. D. C.), the court said:

As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (*except for prohibitions against obscenity, profanity, etc.*), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship, within the meaning of the statute. [Emphasis added.]^{*}

The enunciation of the rules and their application involve no exercise of the Commission's personal judgment as to what is "good" or "bad" as in such cases as *Hannegan v. Esquire, Inc.*,

^{*} See also *Trinity Methodist Church v. Federal Radio Commission*, 62 F. 2d 850 (C. A. D. C.), *cert. den.* 284 U. S. 685; *KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission*, 47 F. 2d 670 (C. A. D. C.); *Independent Broadcasting Co. v. Federal Communications Commission*, 193 F. 2d 900, *cert. den.* 344 U. S. 837; *Simmons v. Federal Communications Commission*, 169 F. 2d 670 (C. A. D. C.); *cert. den.* 335 U. S. 846; *Bay State Beacon, Inc. v. Federal Communications Commission*, 171 F. 2d 826 (C. A. D. C.)

327 U. S. 146.⁹ And cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, and *Superior Films, Inc. v. Department of Education*, — U. S. —, 22 U. S. Law Week 3193 (1954). The standard here has been set by Congress. There is thus no question presented as to the extent to which programming not declared illegal by Congress may constitute a reason for denial of a license on the basis of the Commission's judgment as to quality. The only question is whether the Commission may validly establish a policy that a misuse of licensed facilities so flagrant as to constitute a criminal act under an established standard will be considered sufficient reason to warrant a finding that a further license will not be in the public interest. We believe the answer to be clearly in the affirmative.

II

THE LEGALITY OF THE RULES

A. THE RULES ARE RESTED UPON 18 U. S. C. 1304 IN ITS ENTIRETY

The claim of appellee CBS (Br. 11-12, 39-40) that the validity of the rules must be determined only upon the basis of whether they correctly set forth the elements of a "lottery", as distinguished from "similar scheme, offering prizes dependent

⁹ The *Esquire* decision does not suggest that if the Postmaster General had found that the magazine advertised a lottery, he would have been powerless to carry out his statutory duty to bar it from the mails. Cf. *Public Clearing House v. Coyne*, 194 U. S. 497.

in whole or in part upon lot or chance", is clearly a makeshift. The rules themselves (R. 169-170) repeat in *haec verba* in paragraph (a) the entire statutory language of "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance," and provide that a program will be considered to come within that language if the elements set forth in paragraph (b) of the rules are present.

The intent of the Commission to utilize Section 1304 in its entirety is thus clear from the four corners of the rules. And the Report and Order adopting them not only failed to state, as appellee CBS argues (Br. 11), that their validity was to be determined upon the basis of less than the full language of Section 1304 but, on the contrary, stated in the first paragraph (R. 161):

These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest.¹⁰

¹⁰ Other references to the purpose of the rules and the schemes covered by them at R. 164 and 167 in the Report and Order similarly repeat the full language of 18 U. S. C. 1304.

and further stated with respect to the exact point now raised by CBS (R. 167, footnote):

We believe that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or *whether it be more broadly read*. [Emphasis added.]

There is thus no basis for any argument that the Commission intended to, or did, reject reliance upon the full scope of 18 U. S. C. 1304. Both the rules themselves and the Report and Order make clear the Commission's position that the schemes covered by the rules are either lotteries or similar schemes, whether the statute be narrowly or broadly read.

B. 18 U. S. C. 1304 IS CONSTITUTIONAL AS
INTERPRETED IN THE RULES

Appellee CBS urges that if the programs here involved are covered by 18 U. S. C. 1304, the statute itself is unconstitutional under the Fifth Amendment (Br. 37-39). The argument rests upon the assumption that the give-away schemes are beneficent rather than evil, and the elementary principle that Congress must act rationally in imposing prohibitions. If the programs at issue are covered by the statute (and for the purposes of this discussion appellee CBC assumes that they are) it is because they have the essential elements of lotteries and other similar schemes thought by Congress to be evil. Give-away

schemes permit the exploitation of the cupidity of radio and television audiences for the profit of the promoters of the schemes through the lure of prizes distributed by chance. A rational legislature no doubt could sanction such schemes.¹¹ But this does not mean that a legislature which condemned such schemes would be irrational.

Appellee CBS is really urging merely that its judgment as to what is evil should be substituted for that of Congress. Appellee CBS evidently seeks adoption of the discredited view that laws violate due process unless their objectives are affirmatively established as desirable to the satisfaction of the Court. This Court, however, has demonstrated its unwillingness to assume the function of weighing for itself what is an evil and what is not in the field of business regulation. As the Court said in *Carolene Products Co. v. United States*, 323 U. S. 18, 31:¹²

When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat.

¹¹ Apparently the legislature of Wisconsin has done so (ABC Br. 46).

¹² And see cases there cited. See also *Rast v. Van Deman & Lewis*, 240 U. S. 342, 364-366 as to the severe limitations upon the judicial function in deciding whether a legislature properly thought a scheme similar to a lottery was or was not evil.

Appellee CBS also urges that the validity of the Commission's rules is open to attack because the Commission did not, on its own, find that the schemes involved are evil or tend to demoralize the public.¹³ We find the argument difficult to follow. It is a novel suggestion that an otherwise valid interpretation of a statute must be buttressed by such findings of fact by an administrative agency. The Commission here has not purported to originate a policy for the conduct of broadcast licensees, based upon an evil found by the Commission. It has merely stated that it will deny licenses to those who regularly flaunt a *Congressional* policy formally embodied in a valid criminal statute specifically applicable to broadcast licensees. It would have been superfluous, if not presumptuous, for the Commission to have made a finding that it agreed with Congress that lotteries, gift enterprises and other similar schemes are evil.

C. THE POST OFFICE DEPARTMENT HAS NOT ADOPTED
A MONETARY TEST OF LOTTERY CONSIDERATION

Appellees uniformly attach considerable weight to the position of the Post Office Department,

¹³ In the district court, CBS went so far as to argue that 18 U. S. C. 1304 is only constitutional because directed at schemes which "are evil and tend to impoverish and pauperize the public." (CBS Br. 41; cf. ABC Br. in this Court, p. 36). This contention has apparently now been modified, but even as modified it represents an inadmissible attempt artificially to restrict the plenary authority of Congress over interstate commerce.

which for many years has had the responsibility of administering the postal anti-lottery statutes (CBS Br. 35; NBC Br. 45; ABC Br. 50). And appellees apparently suggest that the Post Office Department has taken a position basically contrary to that of the Commission. This contention is based upon Post Office approval of three programs, "Mu\$ico", "Stop the Music" and "Truth or Consequences."

Each of these Post Office rulings was made without elucidation or discussion of the Department's views on consideration as they might pertain to those individual instances. The reasons for the rulings are necessarily highly speculative. With respect to "Mu\$ico", the Post Office had actually issued prior conflicting interpretations and merely stated in the letter relied upon that *if* the program were again submitted it was *likely* that it would not be held to conflict with the postal lottery laws under the new regulations which were issued in 1947 (R. 229). In the case of "Truth or Consequences", a charitable fund raising campaign was involved, a fact which may have played a considerable part in the decision of the Solicitor of the Post Office that matter relating to the plan would be accepted for mailing (R. 24-25). In the case of "Stop the Music", the only connection of the scheme with use of the mails was the sending of postcards by persons who desired to become eligible to participate. It may well have been the view of the Post Office that sending postcards

from which the lists of persons who would later be called on the telephone were compiled did not involve an existing lottery. See later decision in *United States v. Halseth*, 342 U. S. 277. In fact, the Solicitor's letter specifically stated that the program was one concerned primarily with the use of television and radio facilities, and that the question of whether its operation was in conflict with 18 U. S. C. 1304 was a matter for determination by the Commission (R. 27).

To be contrasted with the cryptic rulings above referred to, are the most recent Postal Bulletin on the subject, and the Post Office Department's position in the *Garden City* case. None of the appellees directs its attention to the Postal Bulletin quoted at page 76 of our principal brief, in which the Office of the Solicitor has reiterated the position of the Post Office Department that monetary consideration is not necessary, and that the expenditure of substantial effort or time will suffice. This basic ruling is in direct conflict with the position of appellees in this case. This is made clear by the position taken by the Post Office Department in *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769, and the statement in the Postal Bulletin that the Department's position is modified only as required by the *Garden City* case and the decision here on appeal.¹⁴ The

¹⁴ Thus the Bulletin (Appellant's Br. 77) states that in view of the *Garden City* case and the decision below: " * * * this office must reverse its rulings which have held considera-

position of the Post Office Department with respect to the nature of consideration furnishes no support to appellees.

III

THE APPLICATION OF THE RULES

Appellees seek to discredit the rules by positing extreme situations in which, it is urged, their application would be absurd.¹⁵ Thus appellee ABC suggests that an educational FM station in Boston, which customarily reproduces fine music and educational programs, might find its license in jeopardy if a breakfast food company should employ the facilities of the station to put on a music quiz which might require or induce listening to the Boston Symphony.

The hypothetical example chosen is not merely extreme; it is impossible of occurrence. The

tion to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc."

¹⁵ It is easy to conjure up hypothetical cases which cast doubt upon the reasonableness of any statute or rule of general application. But the validity of a rule or statute is not to be determined upon the basis of possible applications not at issue in the controversy before the Court. See *United States v. Sullivan*, 332 U. S. 689; *Hebe Co. v. Shaw*, 248 U. S. 297; *Lemieux v. Young, Trustee*, 211 U. S. 489.

station referred to is a non-commercial educational FM station (station WGBH) licensed to an educational foundation. Its license does not authorize it to transmit sponsored or commercial programs.¹⁶ Moreover, the rules at issue were designed to apply to commercial radio and television stations which are authorized to support themselves by the sale of time to sponsors. The entire analysis of the consideration question in the Commission's Report and Order makes clear that it was considering the benefit to commercial stations and their advertisers from increased audiences obtained with lottery bait (R. 168-169). Finally it must be observed that appellee ABC's concern here is not for any interest of its own, or that of the appellees. None of the appellees is licensee of a non-profit educational station, or eligible to become one.¹⁷

For its purportedly absurd example, appellee NBC refers to WNYC, the New York City municipally owned station which is licensed as a regular AM station¹⁸ but actually operates on a non-commercial basis (Br. 34). Appellee NBC apparently considers that WNYC should be permitted to conduct give-away programs because

¹⁶ Section 3.503 (c) of the Commission's Rules and Regulations, 47 CFR 3.503 (c).

¹⁷ Sections 3.503 (a) and 3.621 (a) of the Commission's Rules and Regulations, 47 CFR 3.503 (a); 47 CFR, 1952 Supp., 3.621 (a), as amended, 18 F. R. 252.

¹⁸ The Board of Education of New York City also operates an FM educational station.

there would be no profit to it. We think it clear that if WNYC should hold a *sponsored* give-away program, from which it and the sponsor actually would profit, the mere fact that the station is publicly owned would not and should not exempt it from the Commission's rules. There is no statutory exemption for government operated lotteries. On the other hand, in the rather unlikely event that WNYC should simply embark on a program of giving away public (or contributed) funds without any possible return to it, such activity might well be held to be outside the intendment of the rules.

Appellee CBS argues (Br. 43) that the rationale of the rules breaks down when applied to sustaining programs. Except for particular kinds of sustaining programs which, by their nature, are generally considered inappropriate for commercial sponsorship, it may fairly be said that most such programs are carried with a view toward maintaining or increasing the station's regular listening audience, *i. e.*, its circulation, and with a further view toward eventual use of the program by a sponsor. The size of a station's audience is the saleable commodity which it has to offer. The Commission's Report and Order took official notice of this fact (R. 168), the majority below recognized it (R. 125), and it has nowhere been disputed by any of the appellees. There is no suggestion by any of the appellees

that its "give-away" programs have been intended to be carried on a permanent sustaining basis. It is therefore not correct to assume that bringing a sustaining program of a commercial station within the rules is in any way inconsistent with the stated theory upon which the rules were adopted.

Appellees also suggest that the rules are irrational or unduly harsh in contemplating denial of a license merely because of broadcast of lotteries. Thus appellee ABC urges (Br. 54-56) that the Commission improperly has isolated a single factor in announcing that licenses will not be granted to those who regularly violate 18 U. S. C. 1304. This amounts to a contention that it is unreasonable to refuse a license to one who makes a practice of committing a crime through the operation of facilities licensed only for use in the public interest.

The rules do *not* provide that a license will be denied regardless "of how trivial or how unintentional the violations may be" (ABC Br. 54). They do provide that a license will be denied where the licensee makes a "policy or practice"

of violating the statute.¹⁹ Moreover, a license will be denied only after opportunity for hearing. And judicial review of any such decision is of course available. Communications Act of 1934, Section 309^{4c2}, 47 U. S. C. 309^{4c2}. Denial in such circumstances is both reasonable and lawful. See *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223.

¹⁹ The approach taken by the Commission with respect to the violation of statutes other than the Communications Act (Docket No. 9572, see ABC Br. 54-56), *i. e.* that no policy of absolute disqualification would be adopted in advance, concerned primarily possible violations of statutes not directly or solely relating to the actual use of broadcast facilities. It would obviously be impractical to decide in advance by rule making the weight to be given violations of each of the other statutes of the United States. In the instant case the Commission was dealing with a statute specifically applicable to broadcasting over licensed facilities by those entrusted to use such facilities only in the public interest.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief for appellant, the judgment of the district court should be reversed insofar as it enjoins enforcement of portions of the Commission's rules. The cases should be remanded to that court with directions to dismiss the complaints.

Respectfully submitted.

ME WARREN E. BAKER,
General Counsel,

J. ROGER WOLLENBERG,
Assistant General Counsel,

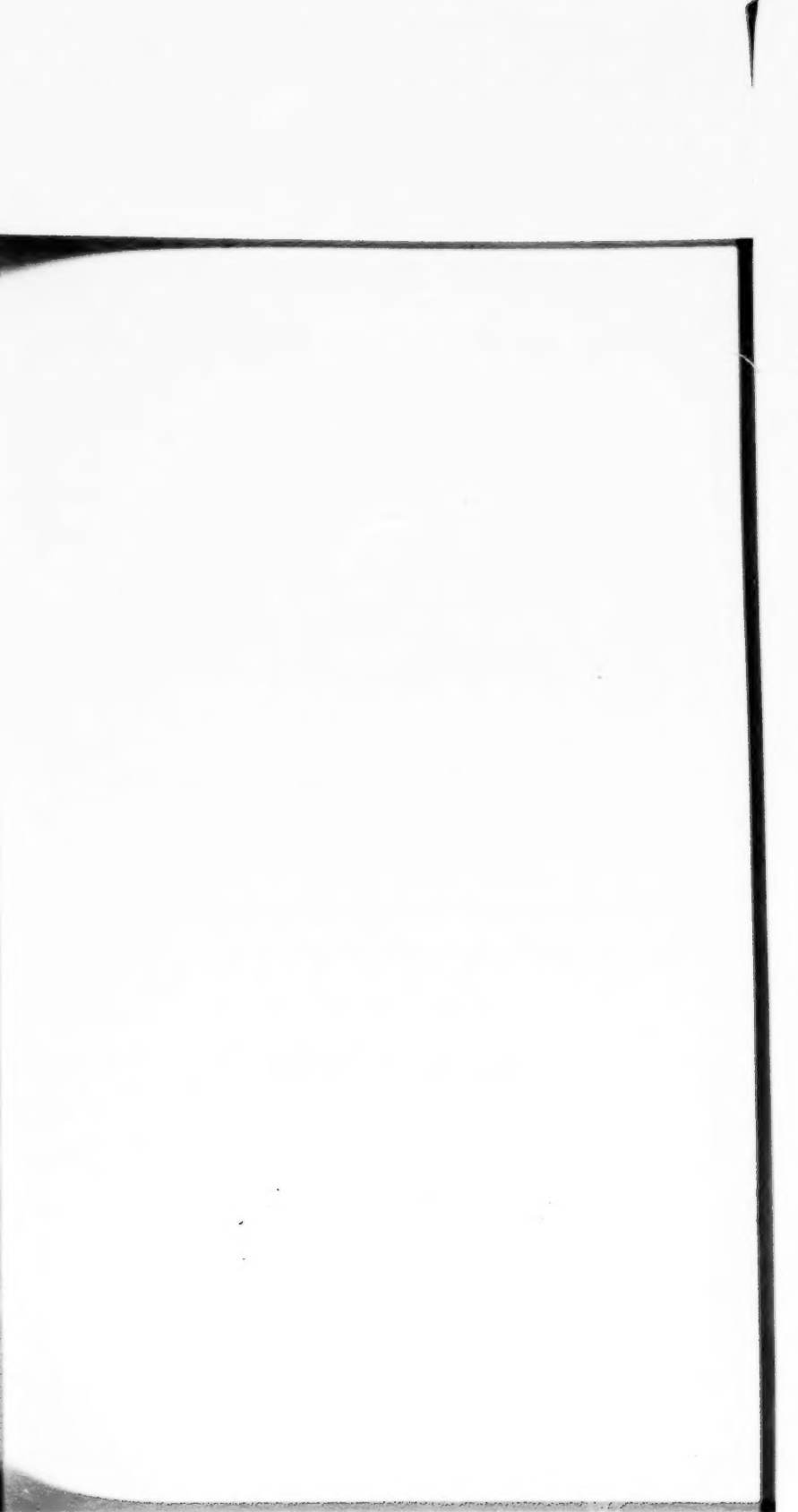
DANIEL R. OHLBAUM,

ERICH SAXL,

Counsel,

Federal Communications Commission.

JANUARY 30, 1954.



JUN 1

HAROLD B.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

AMERICAN BROADCASTING COMPANY, INC.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

MOTION TO AFFIRM

✓ **ALFRED McCORMACK,**
Counsel for Appellee.

per **G. B. ZORBAUGH,**
by **GEORGE B. TURNER,**
and **CHARLES MYNEDEER,**
Of counsel.

BLEED THROUGH-

INDEX

SUBJECT INDEX

	Page
Motion to affirm	1
Opinions below	2
History of the proceedings	2
Decision of the District Court	4
Questions decided below but not raised before this Court	4
The Commission's statement of the issue	6
Grounds for appellee's motion	7
Point I—The District Court's decision on the question of consideration was cor- rect	8
Point II—The question which the Commis- sion asks this Court to review is not of a character or an order of importance which warrants the Court's attention	10
Opinion of the dissenting judge	12
Conclusion	14

TABLE OF CASES CITED

<i>American Broadcasting Co. v. United States</i> , 110 F. Supp. 374	2
<i>Clef, Inc. v. Peoria Broadcasting Company</i> (unre- ported), Eq. No. 21368, C.C. Peoria County, Illi- nois, decree entered November 21, 1939, see opinion below at p. 380	9
<i>Commonwealth v. Wall</i> , 295 Mass. 70	9
<i>People v. Mail & Express Co.</i> , 179 N.Y. Supp. 640, aff'd. 192 App. Div. 903, aff'd. 231 N.Y. 586	5
<i>Waite v. Macy</i> , 246 U.S. 606	5

STATUTES CITED

Communications Act:

47 U.S.C. 154(1)	3
47 U.S.C. 303(r)	3

	Page
47 U.S.C. 316	8
Criminal Code:	
Section 1302 (18 U.S.C. 1302)	8
Section 1304 (18 U.S.C. 1304)	2, 4, 8
Section 1305 (18 U.S.C. 1305)	10
Revised Statutes, Section 3894	8
Rules of the Federal Communications Commission:	
Rule a	2, 4
Rule b(1)	2, 4
Rule b(2)	2, 4
Rule b(3)	2, 4
Rule b(4)	2, 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,
vs. *Appellant,*
AMERICAN BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**MOTION TO AFFIRM THE DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK IN CIVIL
ACTION No. 52-24.**

Appellee moves the Supreme Court of the United States, pursuant to Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed.

The Federal Communications Commission, but not the United States of America, has filed a direct appeal from the final judgment entered March 11, 1953, by the three-judge District Court. The action was brought to enjoin the enforcement of three sets of identical Rules (which will be referred to for brevity as "the Commission's Rules" or

merely "the Rules") promulgated by the Commission and applicable respectively to the three types of broadcasting stations (AM, FM and TV).

The Commission's Rules are set forth in the amended complaint, the District Court's opinion and the jurisdictional statement. They have to do with the application of § 1304 of the Criminal Code (18 U. S. C. § 1304)—the lottery statute pertaining to broadcasting—to what are called "give-away" programs on radio and television. Paragraph (a) of the Rules declares in effect that the Commission will refuse to grant licenses or renewals of licenses to broadcasters who propose to violate § 1304. Paragraph (b), with its four subdivisions, states the various types of programs which the Commission "will in any event consider" to be violations of § 1304.

For a description of a typical give-away program—"Stop the Music"—reference is made to Exhibit A of the amended complaint.

The District Court granted a partial summary judgment in favor of the Commission, sustaining paragraphs (a) and (b) (1) of the Rules and, with Judge Clark dissenting; granted a partial summary judgment in favor of the appellee, enjoining enforcement of subdivisions (2), (3) and (4) of paragraph (b).

Opinions Below

Since the filing of the Commission's appeal, the Opinion of Judge Liebell for the District Court (Judge Weinfeld concurring) and the dissenting opinion of Judge Clark have been reported. 110 F. Supp. 374.

History of the Proceedings

The Commission promulgated the Rules in reliance on its rule-making power under the Communications Act, 47

U. S. C. §§ 154(i) and 303(r). For a history of the proceedings leading up to the promulgation of the Rules, reference is made to paragraphs 7 to 10 of the amended complaint.

The Commission's order provided that the Rules would go into effect on October 1, 1949. On August 31, 1949, appellee filed its complaint in this action. On September 23, 1949, on appellee's motion, Judge Rifkind issued a temporary restraining order and set down the application for an interlocutory injunction for hearing before a three-judge court. Thereupon the Commission, on its own motion, postponed the effective date of the Rules until 30 days after final decision in this and co-pending actions, and the application for an interlocutory injunction became moot.

Discussions between counsel for the Commission and counsel for appellees in this and co-pending actions were carried on from time to time over a three-year period, with a view to working out a convenient procedure for putting the issues before the District Court. An agreement was reached, and pursuant thereto amended complaints were prepared in the several actions and the amended complaint in this case was filed on September 22, 1952. On the same day appellee moved for summary judgment, on the complaint, a supporting affidavit and a stipulation with defendants' counsel, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment.

The allegations of the amended complaint were not denied by the defendants, and the statements of fact in the affidavits of either side were not controverted by the other. Thus the facts were agreed upon and the issues of law submitted to the District Court.

Decision of the District Court

The decision below may be summarized as follows:

(a) The Court held that the Commission had power to announce in advance by rule that it would refuse to grant or renew licenses to broadcasting stations which proposed to follow or to continue to follow a policy of violating § 1304.

(b) It held that one of the tests laid down by the Commission for determining whether particular programs would violate § 1304—the test laid down in paragraph (b) (1) of the Rules—was in accordance with § 1304, and that that provision of the Rules was a valid exercise of the Commission's power.

(c) It held, Judge Clark dissenting, that the other three tests laid down by the Commission for determining whether particular programs would violate § 1304—the tests laid down in subdivisions (2), (3) and (4) of paragraph (b)—were not in accordance with § 1304, and that those provisions of the Rules were beyond the scope of the Commission's power. It reached that result by finding that, in the cases covered by those subdivisions, the element of "consideration", in the sense of the lottery statutes, was not present.

Questions Decided Below But Not Raised Before This Court

In the District Court, appellee contended that the Rules as a whole were invalid, on the grounds (1) that the Commission did not have power to add new sanctions to those provided by Congress for enforcement of the lottery laws and (2) that, in carrying out the Congressional mandate to grant licenses according to "public interest, convenience and necessity", the Commission could not properly isolate a single factor—a violation of the lottery laws—and make

it solely determinative of the right to a license, regardless of all other factors affecting the public interest, convenience and necessity. *Cf. Waite v. Macy*, 246 U. S. 606.

The District Court decided against appellee on those issues, and they are not before this Court, appellee not having appealed.

Appellee also contended in the District Court that paragraph (b) of the Rules was invalid as a whole, because the body of the paragraph (as distinguished from the numbered subdivisions) departed in certain respects from the definition of "lottery" laid down in the decided cases. Particularly it was argued that the element of "chance"—one essential element of a lottery—means chance governing the selection of the winner, and does not comprehend—as paragraph (b) might be construed to comprehend—chance in the selection of the *participants*, where the selection of the *winner* from among the participants is determined by skill or knowledge, and not by chance. The statute condemns schemes "offering prizes dependent . . . upon lot or chance"; and it is the award of the prize, rather than the selection of those who contest for the prize, that must depend on chance, as we read the decided cases.¹ Appellee also argued below that subdivision (1) also departed from the definition of "lottery" as laid down by the decided cases.

The District Court, however, upheld paragraph (b)(1) as a whole, thus ruling contrary to appellee on both issues

¹ An illustration would be a spelling bee, where the contestant from each school was chosen by lot, the prize obtained by money contributions from the several schools, and the prize awarded to the speller who lasted until all others had gone down. Under the decided cases, though "prize" and "consideration" (money contributions to the prize) were found to be present, there would not be a lottery because the winner was not determined by "chance" but by skill. *People v. Mail & Express Co.*, 179 N.Y. Supp. 640, *aff'd*, 192 App. Div. 903, *aff'd*, 231 N.Y. 586, is a leading case on the point.

last mentioned; and the validity of paragraph (b)(1)—the body of paragraph (b) taken in conjunction with its first subdivision—is not before this Court.

However, the Commission's appeal does raise all questions bearing on the validity of the body of paragraph (b) taken in conjunction with subdivisions (2), (3) and (4); and therefore, in the event that the Court shall determine to receive briefs on the merits and hear argument on the Commission's appeal, the question of "chance" may become one of the issues bearing on the validity of subdivisions (2), (3) and (4) of paragraph (b).

At this time, since the Commission has stated the question before the Court solely in terms of "consideration", we will confine our argument to that question. But we desire to reserve the right, if our motion to affirm shall be denied, to argue the question of "chance" and all other questions that may bear on the issues that will then be before this Court.

The Commission's Statement of the Issue

The Commission has stated in the following terms the question which it asks this Court to decide:

"Whether subdivisions (2), (3) and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304".

Reference to subdivisions (2), (3) and (4) will show what the Commission means by "required or induced attention" to programs. Subdivision (2) is the case of "required" attention. It covers programs which the contestant must be listening to or viewing in order to win the prize.

Subdivisions (3) and (4) are cases of "induced" attention. They cover types of contests where, in order to win,

the contestant must answer a question correctly, or answer the telephone or write a letter "in a prescribed manner or with a prescribed phrase". Apparently the Commission presumes that, if aid to answering the question, or learning the "prescribed manner" or "prescribed phrase", could have been obtained by listening to a previous program, "the winner or winners" will have listened to it.

In all the cases comprehended by subdivisions (2), (3) and (4), the Commission finds the element of consideration in "detriment to the promisee" (the winner or winners), consisting of their giving time and attention to a radio program, and "benefit to the promissor" (the program sponsor), who is presumed to gain a listening audience made up of contestants for the prize.

We say "presumed", because the Commission has not attempted to say—nor, so far as we know, to find out—how much of the listening audience for any particular "give-away" program is made up of persons who hope for a prize, and how much is made up of individuals who, without hope for a prize, enjoy the fun of hearing and seeing others exercise their wits and win—or lose.

The Commission has not taken any evidence or made any finding that give-away programs are harmful to the public in any respect. It constructed its rules, and has defended them, solely upon its own interpretation of what is a lottery under § 1304.

Grounds for Appellee's Motion

The grounds on which we now ask for affirmance of the judgment below are:

1. The District Court's decision on the question of "consideration" is in accord with the overwhelming weight of authority and with the uniform construction of the lottery statutes by the Federal Courts and by the Government

agencies concerned with enforcing the lottery laws—the Department of Justice and the Post Office Department.

2. The question which the Commission asks this Court to review is not of a character or an order of importance which justifies the attention of this Court.

Point I—The District Court's Decision on the Question of Consideration Was Correct

It seems unnecessary to review the authorities on the question of consideration as an element of a lottery, in view of Judge Leibell's comprehensive presentation of the authorities in his opinion in the District Court.

The role which the Commission assumes before this Court is an extraordinary one and, we submit, quite without precedent. Section 1304 (formerly § 316 of the Communications Act) has been in force since 1934. The statute on which it is modeled—§ 1302, which applies to the use of the mails the same prohibition as § 1304 applies to broadcasting—has been in effect in substantially its present form since 1872 (R. S. § 3894).

So far as the available records indicate, during 81 years under the postal statute and 19 years under the radio statute, no Federal Court decision or postal ruling has condemned a person, or denied him the use of the mails, for conducting a lottery where the consideration was a technical "detriment to the promisee" or "benefit to the promissor", or anything else except a tangible and valuable consideration paid by contestants, to whom "a chance for a prize for a price" had been offered (opinion below, 110 F. Supp. at 385).

During those respective periods of 81 and 19 years, the Post Office Department and the Department of Justice have uniformly construed the lottery statutes as they have been construed by the District Court. They have construed

those statutes in the light of the mischief at which they are aimed, which is gambling—the hazarding of money on the chance of drawing the winning lot. *Cf. Commonwealth v. Wall*, 295 Mass. 70.

In the face of that uniformity of construction, in the light of the almost unanimous decisions of the courts throughout this country, and further in the face of the rule of strict construction applicable to criminal statutes, a District Judge would be bold indeed to permit a defendant to be convicted under § 1304 on the theory of consideration which the Commission has propounded.

The Commission, however, asks this Court to permit it—an administrative body not charged with the prosecution of crimes—to re-interpret the lottery statutes so as to make criminal a variety of courses of conduct that have been considered innocent in the past.

It is not to be wondered that the Department of Justice has declined to join in the Commission's appeal to this Court.

The record in this case includes an affidavit of G. B. Zorbaugh, filed on appellee's motion for summary judgment, which shows that the Commission's Rules are contrary to the only case (*Clef, Inc. v. Peoria Broadcasting Company*, unreported²) where the issue of give-away programs as lotteries was squarely presented; that they are at variance with the interpretation placed by the Solicitor of the Post Office Department on the postal lottery laws, with respect to the mailing of information concerning such programs; that they proscribe as lotteries programs that have been known to the Department of Justice for many years, and against which that Department has consistently refused to take action; and that they assume in the Com-

² Eq. No. 21368, C.C. Peoria County, Illinois, decree entered November 21, 1939; see opinion below at p. 380.

mission a breadth of authority which its own Chairman in 1943 believed it did not have.

Point II—The Question Which the Commisison Asks This Court to Review Is Not of a Character or an Order of Importance Which Warrants the Court's Attention.

Construction of a criminal statute, especially one—to use the language of the dissenting judge—that has the character of “sumptuary or moralistic legislation”, and is an attempt “to enforce moral precepts which to a large part of the community seem strange and excessively puritanical” (110 F. Supp. at 391 and 393), is peculiarly a matter to be left to the courts, to be worked out from case to case in the light of community standards and a showing of evils that are fairly within the mischief at which the statute is aimed. The Commission is asking this Court to substitute for that process of statutory construction a sweeping re-interpretation of § 1304 by an administrative body—a re-interpretation in the broadest terms, and in terms that are far from being unambiguous, as a reading of paragraph (b) with its subdivisions (2), (3) and (4) will quickly show.

The Commission, in fact, is asking this Court to utter a wholesale declaratory judgment defining crimes under § 1204, and on a record from which the Court can have no way of estimating how far the effect of such a judgment might go, in terms of its application to conduct not heretofore regarded as criminal. For all that can be determined from the record in this case, a decision in favor of the Commission might multiply a hundred-fold the ridiculous situation caused by a departmental misconstruction of the Postal Lottery Law, which caused an uproar in Congress and led to the passage of 18 U. S. C. § 1305, specifically legalizing fishing contests. It is submitted that the Commission's

appeal is so clearly lacking in merit that this Court can and should affirm on the jurisdictional statement.

There may be differences of opinion as to the influence of give-away programs in the cultural life of this country. They have waxed and waned in popularity. They have been defended as a harmless type of entertainment that the public likes, and they have been attacked as "not good broadcasting", because "listeners are attracted not by the quality of the program but simply by the hope of being awarded a valuable prize . . ." (Opinion below, at 388-389, note 7). When such programs were at the height of their popularity, about the time the Commission's rules were promulgated, the Commission, as we understand, was under some pressure from members of Congress to do something to discourage or put a stop to them. At the moment they are not especially popular, and not much is heard about them.

But whatever their merits or demerits may be, Congress has not given the Commission authority to prohibit them, and it may not acquire that authority by assimilating the programs to lotteries through a re-interpretation of § 1304. On the other hand, if such programs—though not involving lotteries—do involve broadcasting practices that can be shown to be contrary to the public interest, convenience or necessity, the Commission may take that fact into consideration in granting or withholding licenses.

For that reason it is submitted that the Commission's appeal does not involve any important questions of public regulation or administrative law or procedure. If give-away programs, or some of them, are in conflict with the standard of public interest, convenience or necessity, then on proof of that fact the Commission may take appropriate action; and it does not need to rewrite a criminal statute in order to exercise the full measure of its authority. On the

other hand, if the programs are not in conflict with the statutory standard, then it is no business of the Commission's to suppress them. From this standpoint it is submitted that the Commission's appeal has so little substance that it might well be dismissed by this Court on the jurisdictional statement.

Opinion of the Dissenting Judge

Judge Clark, dissenting below, would disregard the prevailing authorities on the question of consideration, because "courts and writers have found or created confusion and doubt"; but then he proceeds to deal at some length with the only two cases of any consequence that run counter to the prevailing authorities. Those cases he considers "most apposite", and also "well reasoned." Criticism of them in legal periodicals he finds to be "a masterpiece of unreality", "tendentiously critical remarks" and a "bromidic statement" (110 F. Supp. at 393). He finds that the majority of the court have been "drawn away from the natural answer" to the question of consideration by an "odd mistake" and "an over-precise formulation of the issue", and that they have given the statute an application which "quite inverts the requirement [consideration] and makes it meaningless and irrational." He explains the "confusion" that he finds in the decisions on the ground, already mentioned, that the lottery laws involve "attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical." Then he goes on (at 393):

" . . . The analogy of the Prohibition Amendment is close. Since the law seems harsh, a search most diligent is made to cut down its more drastic operation; in fact, the mind seems to revolt at enforcement of its harsher elements. That, I think, is the real meaning. If people want to waste their time in listening to radio

programs in the hope or off-chance of winning some valuable prizes, why not let them do it. That is a widespread attitude, with which, of course, I have considerable sympathy. But I think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unliked, prohibition into one which is unintelligible. After all, the fate of the Prohibition Amendment showed the proper eventual remedy."

One might search far and wide among judicial opinions to find a more remarkable suggestion. The dissenting judge would reverse a line of statutory construction going back more than a half century, in order to create a situation—"understandable, if unliked"—that might be remedied by repeal or amendment of the statute.

When the dissenting opinion is analyzed, it is found to advance only a single proposition, *viz.*, that the concept of consideration in the law of contracts should be carried over into the lottery laws, where the three essential elements of a lottery have always been found to be "prize, chance and consideration." No reason of principle or public policy is advanced to support that thesis. Nor is any consideration of practical necessity mentioned. On the contrary, it is suggested in the opinion that the lottery laws, if thus construed, may ultimately meet the fate of the Prohibition Amendment.

The only reason for the proposition of the dissenting judge that is advanced to the stage of lucidity is that it is absurd to hold, on the one hand, that a lottery is present if the contestants pay so much as a penny each to the man conducting the game, but to hold that no lottery is present where the contestants give the program sponsor the benefit of their time and attention, which is what every radio advertiser wants and pays to get—and presumably derives benefits from.

FILED
JAN 27 1954

HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

vs.

AMERICAN BROADCASTING COMPANY, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMERICAN BROADCASTING COMPANY, INC.

✓ ALFRED McCORMACK,
Attorney for Appellee.

G. B. ZORBAUGH,
GEORGE B. TURNER,
[CHARLES MYNEDER,
CLOYD LAPORTE, JR.,
Of counsel.

BLEED THROUGH-

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
The Commission's Rules	4
Decision of the District Court	7
Type of Programs Affected by the Rules	9
Scope of Legal Issues Before This Court	10
Terminology	10
Summary of Argument	11
 Argument:	
POINT I.—The Commission's Rules (b)(2), (3) and (4) are invalid, because based upon a misin- terpretation of Section 1304 of the Criminal Code	12
Cross v. The People	17
Valuable Consideration	20
Brooklyn Daily Eagle Case	23
Bank Night Cases	25
Second Thoughts on Bank Night	31
Gift Enterprise Cases	36
Knox Industries Corp. v. State	39
State ex rel. Regez v. Blumer	42
Fishing Contests	47

POINT II.—Rules (b) (2), (3) and (4) are in violation of Sections 307(a) and 309(a) of the Communications Act, which require the Commission to grant or withhold station licenses solely according to the public interest, convenience and necessity	51
POINT III—Rules (b) (2), (3) and (4) are invalid as imposing censorship on broadcasting stations, contrary to the First Amendment and contrary to Section 326 of the Communications Act	57
POINT IV.—Failure of appellee to appeal from the judgment sustaining Rules (a) and (b) (1) does not preclude it from raising the arguments set forth under Points II and III	62
Conclusion	66
Appendix A	i

TABLE OF CASES

<i>Affiliated Enterprises v. Gantz</i> , 86 F. 2d 597	25n
<i>Albert Lea Amusement Corp. v. Hanson</i> , 231 Minn. 401, 43 N. W. 2d 249	34
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288	64
<i>Barnes v. Strathern</i> , [1929] S. C. (J) 41	22
<i>Bell v. The State</i> , 37 Tenn. (5 Sneed) 507	38n
<i>Boasberg v. United States</i> , 60 F. 2d 185, cert. denied, 287 U. S. 664	10
<i>Brice v. State</i> , 242 S. W. 2d 433	17
<i>Brooklyn Daily Eagle v. Voorhies</i> , 181 Fed. 579	23
<i>Buckalew v. State</i> , 62 Ala. 334	18n
<i>City of Roswell v. Jones</i> , 41 N. M. 258, 67 P. 2d 286	31
<i>Clef, Inc. v. Peoria Broadcasting Co.</i> (C. C. Peoria County, Ill. 1939), unreported	50

<i>Commonwealth v. Heffner</i> , 304 Mass. 521, 24 N. E. 2d 508	29, 52
<i>Commonwealth v. Lund</i> , 142 Pa. Super. 208, 15 A. 2d 839	16n
<i>Commonwealth v. McLaughlin</i> , 307 Mass. 230, 29 N. E. 2d 821	16n
<i>Commonwealth v. Wall</i> , 295 Mass. 70, 3 N. E. 2d 28	14n, 20, 24, 27, 30, 36, 52
<i>Commonwealth v. Wright</i> , 137 Mass. 250, 50 Amer. Rep. 306	18n
<i>Cross v. The People</i> , 18 Colo. 321, 32 Pac. 821 ...	17, 18, 19
<i>Darlington Theatres v. Coker</i> , 190 S. C. 282, 2 S. E. 2d 782	39n
<i>Federal Communications Commission v. WOKO, Inc.</i> , 329 U. S. 223	54
<i>Furst v. A. & G. Amusement Co.</i> , 128 N. J. L. 311, 25 A. 2d 892	36
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, 192 F. 2d 240, 104 F. Supp. 235	16, 17
<i>Glover v. Malloska</i> , 238 Mich. 216, 213 N. W. 107 ...	29
<i>Governors v. Art Union</i> , 7 N. Y. 228	18n
<i>Grimes v. State</i> , 235 Ala. 192, 178 So. 73	16n
<i>Harriman Institute of Social Research v. Carrie Ting- ley Crippled Children's Hospital</i> , 43 N. M. 1, 84 P. 2d 1088	31, 43
<i>Horner v. United States</i> , 147 U. S. 449	37
<i>Hull v. Ruggles</i> , 56 N. Y. 424	18n
<i>KFKB Broadcasting Association, Inc. v. Federal Com- munications Commission</i> , 47 F. 2d 670	58
<i>Knox Industries Corp. v. State ex rel. Scanland</i> , 258 P. 2d 910	38, 39, 40, 41
<i>LeTulle v. Scofield, Collector of Internal Revenue</i> , 308 U. S. 415	64, 66
<i>Maughs v. Porter</i> , 157 Va. 415, 161 S. E. 242 ...	13n, 36, 38, 40

<i>Near v. Minnesota</i> , 283 U. S. 697	59, 61
<i>Pennsylvania v. West Virginia</i> , 262 U. S. 553	64
<i>People v. Burns</i> , 304 N. Y. 380	17
<i>People v. Mail & Express Co.</i> , 179 N. Y. Supp. 640, aff'd, 192 App. Div. 903, aff'd, 231 N. Y. 586.....	8n, 17
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773, cert. denied, 241 U. S. 675	17
<i>Public Clearing House v. Coyne</i> , 194 U. S. 497	62
<i>Rountree v. Ingle</i> , 94 S. C. 231, 77 S. E. 931	38n
<i>Simmons v. Federal Communications Commission</i> , 169 F. 2d 670	59
<i>State ex rel. Cowie v. LaCrosse Theaters Co.</i> , 232 Wis. 153, 286 N. W. 707	44-5
<i>State ex rel. Draper v. Lynch</i> , 192 Okla. 497, 137 P. 2d 949	39, 40
<i>State ex rel. Regas v. Blumer</i> , 236 Wis. 129, 294 N. W. 491	38, 42, 44, 45
<i>State v. Big Chief Corporation</i> , 64 R. I. 448, 13 A. 2d 236	17, 34, 35
<i>State v. Bryant</i> , 74 N. C. 207	18n
<i>State v. Clarke</i> , 33 N. H. 329, 66 Amer. Dec. 725	18n
<i>State v. Danz</i> , 140 Wash. 546, 250 Pac. 37	32
<i>State v. Eames</i> , 87 N. H. 477, 183 Atl. 590	30
<i>State v. Horn</i> , 16 N. J. Misc. 319, 1 A. 2d 51	41
<i>State v. Hundling</i> , 220 Iowa 1369, 264 N. W. 608....	30, 41
<i>State v. Jones</i> , 44 N. M. 623, 107 P. 2d 324.....	31, 42
<i>State v. Mumford</i> , 73 Mo. 647	18n
<i>State v. Schubert Theatre Players Co.</i> , 203 Minn. 366, 281 N. W. 369	16n, 34
<i>State v. Shorts</i> , 32 N. J. L. 398, 90 Amer. Dec. 668 ..	18n
<i>State v. Stern</i> , 201 Minn. 139, 275 N. W. 626	25n
<i>Superior Films, Inc. v. Department of Education, U. S.</i> <i>L. W.</i> 3193 (January 12, 1954)	57, 62
<i>Thomas v. People</i> , 59 Ill. 160	18n

<i>United States v. American Ry. Exp. Co.</i> , 265 U. S. 425	64
<i>United States v. Olney</i> , 1 Deady 461, Fed. Cas. No. 15,918	18n
<i>United States v. One Box of Tobacco</i> , 190 Fed. 731	38n
<i>Waite v. Macy</i> , 246 U. S. 606	51
<i>Wallingford v. Mutual Society</i> , 5 App. Cas. 685	22
<i>Wilkinson v. Gill</i> , 74 N. Y. 63, 30 Amer. Rep. 264	18n
<i>Willis v. Young</i> , [1907] 1 K. B. 448	22
<i>Winters v. People</i> , 333 U. S. 507	57
<i>Yellow-Stone Kit v. State</i> , 88 Ala. 196, 7 So. 338	17, 18n

STATUTES

Communications Act of 1934, as amended	2
Appendix A	
Sec. 4(i)	61
Sec. 303(r)	61
Sec. 307(a)	11, 51
Sec. 309(a)	11, 51
Sec. 312(a)	54n
Sec. 316	3n
Sec. 326	3, 7, 11, 57, 58, 59, 61, 62, 68
Title 18 U. S. C. § 1304	2, 3n, 4, 7, 8, 10, 11, 12 19, 49, 50, 54, 57, 61, 66
Title 18 U. S. C. § 1305	47, 48
Title 28 U. S. C. §§ 1253, 2101(b)	2
Title 39 U. S. C. § 259	61, 62
Title 39 U. S. C. § 732	62
Arkansas, Acts 1937, No. 238, § 1, p. 851	32
Arkansas, Stat. 1947, § 84-2209	32

	PAGE
Colorado Gen. Stat. § 2196	19
Florida Stats. 1951 § 849.09	19n
Georgia Code 1933, § 26-6502	19n
Kentucky, Rev. Stat. 1943, § 436.360	33
Montana, Rev. Code 1947, § 94-3002	33
New Mexico, Laws 1949, ch. 133	31
New Mexico Stat. 41-2218	32
Oklahoma, Stat. (1951), Title 21, § 1051	33, 40
Wisconsin Constitution (Art. IV, § 24)	47n
Wisconsin Laws 1951, ch. 436 (amending Wisc. Stat. § 348.01)	46
Act for Suppressing Lotteries, 10-11 Will. III, c. 17, ss. 1-3	21, 38n

MISCELLANEOUS

F. C. C. Blue Book Report, March 7, 1947, "Public Service Responsibilities of Broadcast Licensees" ..	58
XV Halsbury's Laws of England (2d ed.)	
525	17, 22n, 44n
526	22
526-7	48n
45 Harvard Law Review 1206	39n
Memorandum for the Postmaster General (by Hon. Paul A. Crowley, Solicitor of the Post Office Depart- ment) in a departmental proceeding against Affiliated Enterprises, Inc.	26, 29
NRA Motion Picture Code	27
39 Opinions of the Attorney General (Wis.) 374	45

Report in F. C. C. Docket No. 9572, released March 29, 1951	55
Report of Senate Committee on 18 U. S. C. § 1305, 2 United States Code Congressional Service, 81st Cong. 2nd Sess. 1950, pp. 3010-11	47, 48
Report of Senate Committee on § 1333 (No. 1567, 80th Cong., 2nd Sess.)	59, 60
80 University of Pennsylvania Law Review 744	39n
18 Virginia Law Review 465	39n
Williams, Flexible Participation Lotteries (1938) ..	21, 39
Williston on Contracts (1936) § 110	20

BLEED THROUGH-

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

AMERICAN BROADCASTING COMPANY, INC.,

Appellee.

No. 117

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMERICAN BROADCASTING COMPANY, INC.

OPINIONS BELOW

The opinion of Judge Leibell for the District Court (Judge Weinfeld concurring) and the dissenting opinion of Judge Clark have been reported at 110 F. Supp. 374 and 391 (R. 110 and 132). The Report and Order of the Federal Communications Commission (hereinafter referred to as "the Commission") adopting the Rules which are in issue in this case appear at 14 Fed. Reg. 5429 (R. 161).

JURISDICTION

The judgment of the court below was entered March 11, 1953 (R. 138). A petition for appeal was filed on May

8, 1953, and allowed on the same day (R. 140). The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 2101(b). On October 12, 1953, this Court noted probable jurisdiction and consolidated this case with Nos. 118 and 119 for argument (R. 307).

QUESTION PRESENTED

The Rules of the Commission that appellee attacked by its complaint (and to which we shall refer as "the Rules") are composed of two lettered paragraphs, (a) and (b), the latter having four numbered subdivisions. The District Court upheld Rules (a) and (b)(1) as a valid exercise of the Commission's rule-making power, but set aside and enjoined the enforcement of Rules (b)(2), (3) and (4). The question presented on the Commission's appeal is whether the District Court was right in holding that Rules (b)(2), (3) and (4) were not a valid exercise of the Commission's rule-making power.

STATUTES INVOLVED

The sections of the Communications Act* upon which the Commission relies for authority to adopt the Rules are set forth in Appendix A hereto. Section 1304 of the Criminal Code, 18 U. S. C. § 1304, which the Commission's Rules purport to interpret, is as follows:

"§ 1304. *Broadcasting lottery information.*

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such

*Throughout this brief we refer to the Communications Act of 1934, as amended, as "the Communications Act".

station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

Section 326 of the Communications Act, upon which we rely as one of the bases on which Rules (b) (2), (3) and (4) must be held invalid, is as follows:

"§ 326—Censorship

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

STATEMENT

By notice dated August 5, 1948, and supplemental notice* dated August 27, 1948, the Commission announced that it was proposing to adopt certain rules governing the type of radio and television program popularly known as

*The supplemental notice corrected an error in the original notice, in the specification of the statutes on which the Commission was relying. The original notice included § 316 of the Communications Act, which Congress had repealed on June 25, 1948, at the same time enacting a similar statute, slightly modified in wording, as § 1304 of the Criminal Code (cited and quoted above in the text).

"telephone give-aways", "give-away contests", "give-away programs" or merely "give-aways."

Pursuant to the above notices, this appellee and others filed briefs in opposition to the proposed rules and participated in oral argument at a hearing before the Commission on October 19, 1948. The Commission did not present any argument in support of the proposed rules at the hearing. Nor did it have before it any evidence that programs coming within the terms of the proposed rules adversely affected the public interest (R. 3-4).

On August 18, 1949, the Commission, acting by four of its seven members, and with one (Commissioner Hennock) dissenting, issued a Report and Order promulgating and adopting the Rules, to be effective October 1, 1949.

THE COMMISSION'S RULES

The Rules as adopted by the Commission are as follows:

"Lotteries and Give-Away Programs—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304).

"(b) The determination whether a particular program comes within the provisions of subsection

(a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

“(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

“(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

“(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

“(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed

phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

On August 31, 1949, appellee filed its complaint in this action. On September 19, 1949, Judge Rifkind convened a statutory court, and on September 23, 1949, after argument on a motion for a temporary restraining order, Judge Rifkind issued a restraining order and set down the application for an interlocutory injunction for hearing before the three-judge court at a later date. That application, however, did not come on for hearing because, following Judge Rifkind's issuance of a temporary restraining order, the Commission on its own motion postponed the effective date of its proposed rules until 30 days after final decision in this and the co~~p~~ending actions.

Following a number of discussions between counsel for the Commission and counsel for plaintiffs in the several actions, it was agreed that the cases could be and should be presented to the court in a form not requiring a decision on questions of fact. For that purpose, an amended complaint was prepared in this action, to exclude all allegations that the defendants were not prepared to admit; and the amended complaint was filed on September 22, 1952.* On the same day the plaintiff moved on the amended complaint, a supporting affidavit and a stipulation with defendants' attorneys, for summary judgment, and defendants filed a cross-motion for an order dismissing the complaint or, in the alternative, for summary judgment.

*The records of the three cases before the District Court have been consolidated into a single record in this Court and, pursuant to stipulation (R. 1), the Commission and each of the appellees is entitled to rely in all three cases on facts set forth in the complaints and affidavits in any of them.

DECISION OF THE DISTRICT COURT

The decision below may be summarized as follows:

(a) The Court held that the Commission had power to announce in advance by rule that it would refuse to grant or renew licenses to broadcasting stations which proposed to follow or to continue to follow a policy of broadcasting programs that violate § 1304.

(b) It held that one of the tests laid down by the Commission for determining whether particular programs would violate § 1304—the test laid down in Rule (b)(1)—was in accordance with § 1304, and that that Rule was a valid exercise of the Commission's power.

(c) It held, Judge Clark dissenting, that the other three tests laid down by the Commission for determining whether particular programs would violate § 1304—the tests laid down in Rules (b)(2), (3) and (4)—were not in accordance with § 1304, and that those Rules were beyond the scope of the Commission's power. It reached that result by finding that, in the cases covered by those subdivisions, the element of "consideration", in the sense of the lottery statutes, was not present.

The District Court held that Rules (b)(2), (3) and (4) were in violation of the First Amendment, because based upon an erroneous construction of the law, but that Rules (a) and (b)(1) were not, and further that § 326 of the Communications Act, prohibiting the censorship of radio programs, did not bar the Commission from making rules designed to prevent the broadcasting of lotteries.

The court decided against appellee on the constitutional issues raised by paragraph 18 of the complaint (R. 7) and

on several issues raised by paragraph 16 (R. 6-7), relating principally to the requirements of the Administrative Procedure Act and the power of the Commission to add sanctions of its own to those established by Congress for violations of § 1304.

Under the allegation of paragraph 16 (d) that the Rules were based upon an incorrect interpretation of § 1304, we argued below that the Commission erroneously interpreted not only the requirement of "consideration" but also the requirement of "chance" under the lottery statutes, since under the cases it is established that the chance that is an essential of a lottery is chance in the *awarding* of the prize, and not chance in the selection of the participants.*

In the telephone give-away contests, the prize goes to the person, among the participants who are called on the telephone, who makes the correct identification or gives whatever else may be the correct answer. The award of the prize is a matter of skill, though the participants have been selected by chance. But the court pointed out that, in the programs that were before it, consolation prizes were given to all contestants, and said that "chance" was therefore present to a sufficient degree to satisfy the requirement of a lottery. In other words, the chance that selects a participant automatically results in the award to him of a consolation prize; and in that sense chance deter-

*An illustration would be a spelling bee designed to test average students—where the contestant from each school was chosen by lot, the prize obtained by money contributions from the several schools, and the prize awarded to the speller who lasted until all others had gone down. Under the decided cases, though "prize" and "consideration" (money contributions to the prize) were found to be present, there would not be a lottery because the winner was not determined by "chance" but by skill. *People v. Mail & Express Co.*, 179 N. Y. Supp. 640, *aff'd*, 192 App. Div. 903, *aff'd*, 231 N. Y. 586, is a leading case on the point.

mines the award of *some* of the prizes, though not the final and important prize.

As the record does not contain any examples of contests where consolation prizes are not given, we do not ask this Court to pass on the question of "chance" which we raised below. We merely note, for what bearing it may have on the arguments against the validity of Rules (b) (2), (3) and (4) under our Points II and III, that, if the words in Rule (b) are read literally, the Commission is proposing a test that might make Rule (b) applicable to a great variety of situations, such as our "spelling bee" illustration in the footnote, to which the lottery statutes were never intended to apply.

TYPE OF PROGRAMS AFFECTED BY THE RULES

The programs involved in this case are of the kind where a prize is given for the correct solution or answer. When, as is often the case, the prize is awarded for an identification, the subject may be a living person, an historical character, a book, a musical composition or any other identifiable thing. In the two programs that were put before the Court below by appellee as typical—"Stop the Music" (radio program) and "Stop the Music" (TV program), the subject for identification is a tune called the "mystery melody".* Contestants are selected from telephone directories by a random process, and when called on the telephone a contestant must qualify by first identifying a popular melody. If he does that, then the mystery melody is played for him, and if he can identify it he is the winner. Prizes accumulate from week to week until somebody wins.

*Neither of the "Stop the Music" programs is "on the air" at the present time.

Descriptions of the two programs are set forth at R. 8-10, and written transcriptions of a typical example of each of them are set forth at R. 63-89.

SCOPE OF LEGAL ISSUES BEFORE THIS COURT

The effect of the decision of the District Court was to declare lawful all appellee's give-away contests. Appellee did not appeal from the judgment sustaining Rules (a) and (b)(1) because it was not and is not broadcasting, has never to its knowledge broadcast, and has no intention of broadcasting in the future, any program falling within Rule (b)(1) or any program falling within Rule (a) after excluding from the application of that Rule the types of programs that fall within Rules (b)(2), (3) and (4).

We do, however, urge upon this Court (Points II and III) a number of arguments which, if we were entitled to appeal and had appealed from the judgment sustaining Rules (a) and (b)(1), could have been addressed to the validity of those Rules as well.

TERMINOLOGY

18 U. S. C. § 1304 refers to "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance"; but, while the term "gift enterprise" has a fairly well understood meaning, and the courts have sometimes referred to schemes of chance as "similar to lotteries" (see *Boasberg v. United States*, 60 F. 2d 185, 186, *cert. denied* 287 U. S. 664), the tests which are applied to all such schemes—"prize", "chance" and "price" (or "consideration")—are the same, and the courts almost universally treat gift enterprises and similar schemes as categories of lotteries.

We shall therefore employ the word "lottery" as the equivalent of the statutory words "lottery, gift enterprise, or similar scheme". The suggestion of the Commission in its Brief (p. 15) that give-away contests can be brought under the statute as "similar schemes", if they are not "lotteries", is so wholly without support of authority that it does not require an answer.

Give-away contests are broadcast on television as well as on the aural radio; but to avoid such lengthy expressions as "listening to the radio or viewing the picture on television", we shall confine our references to radio, merely noting here that they apply equally to television.

SUMMARY OF ARGUMENT

Point I—The Commission's Rules (b)(2), (3) and (4) are invalid, because based upon a misinterpretation of Section 1304 of the Criminal Code.

Point II—Rules (b)(2), (3) and (4) are in violation of Sections 307(a) and 309(a) of the Communications Act, which require the Commission to grant or withhold station licenses solely according to the public interest, convenience and necessity.

Point III—Rules (b)(2), (3) and (4) are invalid as imposing censorship on broadcasting stations, contrary to the First Amendment and contrary to Section 326 of the Communications Act.

Point IV—Failure of appellee to appeal from the judgment sustaining Rules (a) and (b)(1) does not preclude it from raising the arguments set forth under Points II and III.

ARGUMENT

POINT I.

THE COMMISSION'S RULES (b)(2), (3) AND (4) ARE INVALID, BECAUSE BASED UPON A MISINTERPRETATION OF SECTION 1304 OF THE CRIMINAL CODE.

A detailed discussion of the Commission's Rules (b)(2), (3) and (4) is not necessary, because the Commission has clearly stated their purpose, saying that they "delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize" (Com. Br. 24). Subdivision (2) covers the case where listening to the radio is a requirement of the contest. Subdivisions (3) and (4) are cases where, according to the Commission's view, the program is so set up as to make it likely, and perhaps almost certain, that those who desire to win the prize will listen to the radio for help to that end.

The Commission's thesis seems to be that listening to the radio is an act, the doing of which is procured by the advertiser for the purpose of attracting a larger radio audience; that as the act is a "detriment to the promisee", and results in a "benefit to the promisor", consideration in the contract sense is present; and that the presence of that "consideration", accompanied by an award of prizes "in part by lot or chance", brings give-away contests under § 1304 of the Criminal Code.

We do not know of any case that has passed on the question of whether consideration in the contract sense is present in give-away contests, or at least in some of them. But where the advertiser has offered a prize for a correct

identification or other answer, and the winner has found out the answer and given it over the telephone, and as part of the program he has been identified and his answer repeated to the listening public, it seems that the advertiser has got what he bargained for and that, should he fail to deliver the prize, he would be liable to the winner for a breach of contract. In any event we assume that in such a case consideration in the contract sense is present.*

But the fact that the winner may claim the prize as a matter of contract is not determinative of whether the participants in the contest have furnished consideration in the sense required by the lottery cases. For the overwhelming weight of authority under the lottery laws in this country and in England establishes that the element of consideration in a lottery means something staked—some actual price in money or its equivalent that is paid for the chance for a prize. Even Judge Clark, dissenting below, made his bow to the decided cases when, discussing the question of consideration, he conceded (R. 135) that “The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance”.

The Commission asks this Court to supplant a long-established rule of law by one that makes the test of a lottery—not whether the participants gamble their money by paying a price for a chance—but whether the promoter of the scheme derives a benefit from acts of a sort never yet held to be a form of gambling—specifically the act of following a prize contest on the radio or listening to the radio for clues to the winning answer.

**Maughs v. Porter*, 157 Va. 415, 161 S. E. 242 (discussed *infra*) appears to us to have been decided correctly on the issue of contract consideration.

In his dissenting opinion Judge Clark, after stating his view of the purpose of the lottery statutes and the evils at which they are aimed, formulated the premise on which the Commission mainly rests its argument, as follows (110 F. Supp. at 392; R. 133-34):

"There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.* But it is still possible for anyone—advertiser, broadcaster, or what not—to make pure gifts; the Commission calls attention to the plot of a moving picture of twenty years ago, 'If I had A Million,' and says that if 'a rich man gives away his millions to persons chosen at random, it may be conceded that no evil would be done and no violation of the law would be involved.' *So what we are looking for is really some gain to the promoters of the scheme which takes the matter out of the realm of pure altruism.*"**

Following Judge Clark's lead, the Commission has formulated an entirely novel test of a lottery (Br. p. 22):

"The essence of a lottery lies in the profit reaped by its promoter from the exploitation of the cupidity of the participants which leads the latter to take action beneficial to the promoter."***

Thus the Commission, by devising a formula, reads out of the cases practically everything they have said about the

*If a watchband manufacturer sponsors a contest in which prizes are awarded for correct identifications of musical selections ("Stop the Music"), and he sells more watchbands because his name and product have become known to a large audience attracted by the program, it is not clear to us how a court can find *a priori* that his enrichment is "unjust" or that he is a "manipulator".

**Emphasis in all quotations in this brief is ours.

***Compare the definition in the leading case of *Commonwealth v. Wall*, 295 Mass. 70, 3 N. E. 2d 28, 29, that "the essence of a lottery is a chance for a prize for a price."

evil at which lottery statutes are aimed, which is *gambling* by the participants. No trace of the Commission's formula can be found in previous decisions of the courts. It is a tendentious premise, concocted to support a pre-determined conclusion.

Nor do the judicial decisions on lotteries give support to Judge Clark's distinction—which is the Commission's distinction also—between the “pure gift” and the case of gain to the promoters. Courts have not had to deal with cases like that of the imaginary rich man in “If I had a Million”, who gave away his money at random. The “pure gift” case does not come up in real life. The cases with which the courts have dealt have involved prizes given away for business reasons—to advertise mercantile establishments or merchandise, to attract potential buyers to stores, to stimulate attendance at motion picture shows or auctions, or in some other way to derive an ultimate benefit—or hoped for benefit—that would more than make up for the cost of the prize.

When cases of that sort have come up for decision, the courts have not made a “search for an ultimate financial benefit to the promoter” (Com. Br. 51). What they have searched for has been a price paid by the participants in the drawing; and the question of lottery or no lottery has turned on whether participants paid for their chances. If they did not, then according to the great weight of authority the fact that the prize givers may derive good will from their bounty, or get business from the advertising that the contest creates, does not make the contest a lottery.

The Commission misconstrues the references in the cases to the profits of the promoter. Where the question before a court is whether participants in fact have paid a price for their chances, the promoter's profits are cited

only to prove that in fact they have. In the Bank Night cases, for example, the profits of the promoter (or, more accurately, the increased box office receipts on Bank Nights) are cited—not because the promoter's profits are significant in themselves, but because they tend to show that many of the persons attending the theatre on Bank Night have paid their money to get in on the drawing, rather than to see the picture.*

Profits of the promoter are cited also in connection with the doctrine that a lottery exists only when the participants contribute to a fund out of which the prizes are paid. The Commission criticizes *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E. D. N. Y. 1951), 192 F. 2d 240, 104 F. Supp. 235, as having “adopted a principle not advocated by the majority below or any of the appellees, *i.e.*, that lottery consideration consists of a ‘contribution in kind to the fund or property to be distributed.’ ”

The Commission is in error about what appellee advocates, because we certainly do advocate the principle that there is no lottery unless the participants or some of them, or others on their behalf, pay money or its equivalent into a fund which pays for the prizes. That principle is inherent in the doctrine of “price”, and is in fact only another way of stating the requirement of price. Obviously if there is a price paid by the contestants to the promoter, the prizes come out of the price. If the prizes do not come out of contributions by the participants, or someone on their behalf, then no price has been paid and there is no lottery.** The

**Grimes v. State*, 235 Ala. 192, 178 So. 73, 74; *Commonwealth v. McLaughlin*, 307 Mass. 230, 29 N. E. 2d 821, 822; *Commonwealth v. Lund*, 142 Pa. Super. 208, 15 A. 2d 839, 846.

**Of course, a scheme is not any less a lottery if the promoter guesses wrong and does not collect enough to cover the prize. See *State v. Schubert Theatre Players Co.*, 203 Minn. 366, 281 N. W. 369, 370.

expression of "price" in terms of contributions by participants to the fund out of which the money is paid is found particularly in the English cases. In XV Halsbury's *Laws of England* (2d ed.) 525, it is said:

"But though this gambling element does not appear ever to be wholly absent, yet it need not be common to all the adventurers; it is enough that some of them stand to lose. Therefore, if some of the adventurers have, however indirectly, *contributed to the fund out of which prizes are to be paid*, they risk the amount of their contributions, and in such a case it is immaterial that others who have contributed nothing may win the prize."

CROSS v. THE PEOPLE

When a shoe merchant raffled off a piano—having given chances not only to his customers but to all others who asked for them and all who, living at a distance, sent in post cards, it was held that he was not conducting a lottery; that participation was free, so that the element of consideration was not present; and that the benefit the merchant may have derived or hoped to derive from the scheme as an advertising vehicle was an irrelevant matter under the lottery statute. *Cross v. The People*, 18 Colo. 321, 32 Pac. 821. In accord are: *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916); *Garden City Chamber of Commerce v. Wagner*, *supra*; *People v. Mail & Express Co.*, 179 N. Y. Supp. 640, *aff'd* 192 App. Div. 903, *aff'd*, 231 N. Y. 586; *State v. Big Chief Corporation*, 64 R. I. 448, 13 A.2d 236 (1940); *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890); *Brice v. State*, 242 S. W. 2d 433 (Tex. Crim. App. 1951); *People v. Burns*, 304 N. Y. 380 (1952).

The *Cross* case contains an excellent summary of the doctrine of consideration in the law of lotteries as it had been laid down in the leading cases in this country, as follows (32 Pac. at 822):

"It may be accepted as the result of the adjudicated cases that a valuable consideration must be paid, directly or indirectly, for a chance to draw a prize by lot, to bring the transaction within the class of lotteries or gift enterprises that the law prohibits as criminal.* The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance *is not induced to hazard money* with the hope of obtaining a larger value, *or to part with his money at all*; and the spirit of gambling is in no way cultivated or stimulated, *which is the essential evil of lotteries*, and which our statute is enacted to prevent. . . . The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is

*Citing *Buckalew v. State*, 62 Ala. 334; *State v. Bryant*, 74 N. C. 207; *Com. v. Wright*, 137 Mass. 250, 50 Amer. Rep. 306; *State v. Clarke*, 33 N. H. 329, 66 Amer. Dec. 725; *State v. Shorts*, 32 N. J. L. 398, 90 Amer. Dec. 668; *Wilkinson v. Gill*, 74 N. Y. 63, 30 Amer. Rep. 264; *Governors v. Art Union*, 7 N. Y. 228; *State v. Mumford*, 73 Mo. 647; *Hull v. Ruggles*, 56 N. Y. 424; *Thomas v. People*, 59 Ill. 160; *U. S. v. Olney*, 1 Dedy 461, Fed. Cas. No. 15,918; *Yellow-Stone Kit v. State*, *supra*.

necessary to constitute this a lottery within the purview of the statute, *to wit*, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

Cross v. The People is a leading case on consideration in lotteries, and it represents the great weight of authority to this day. It was decided under a statute (Colo. Gen. Stat. § 2196) that was in form like 18 U. S. C. § 1304, in that it prohibited "any lottery or gift enterprise" but did not define the terms, and did not mention "consideration". Hence the *Cross* case bears on the argument of the dissenting judge (R. 133) and of the Commission (Br. 18, 47, 58-60) that § 1304 of the Criminal Code must be construed more broadly than those statutes, like the one in New York, that make reference to "valuable consideration" or some equivalent.* The thought seems to be that the federal statute leaves the courts with some discretion as to "the extent that consideration may be read into" the federal statutes (Com. Br. 18).

Of course, where a statute defines a lottery in terms of "valuable consideration" paid, or "money or valuable thing" hazarded, by the participants, it is not surprising that a court will refer to the statute as authority for that particular requirement of a lottery. But the decisions under the federal lottery statutes, the English Act, and the many anti-lottery provisions of State constitutions and statutes that merely condemn lotteries without defining the term, demonstrate beyond doubt that the requirement described by the

**E.g.*, such terms as "for money or for anything of value" (Florida Stats. 1951, § 849.09) and "the hazarding of any money or valuable thing" (Georgia Code 1933, § 26-6502).

words "valuable consideration" is inherent in the concept of "lottery".

VALUABLE CONSIDERATION

It may be thought that "valuable consideration" is a confusing term, since "valuable" has significance, not in the law of contracts, but rather in the law of conveyances, where it is distinguished from good or meritorious consideration, such as love and affection. I Williston on Contracts (1936) § 110. But the cases show that legislatures and courts have used the qualification "valuable" to mark the distinction between consideration in contract law and consideration in lotteries; and once the requirement of "price" is expressed as "consideration", the qualification of "valuable" is a useful and understandable one. It signifies the doctrine that has been established by the great weight of authority, and which was expressed in *Commonwealth v. Wall*, *supra* (3 N. E. 2d at 29-30), as follows:

"... the essence of a lottery is a chance for a prize for a price . . . 'Price' in this connection means something of value and not the formal or technical consideration which would be sufficient to support a contract."

The suggestion of the dissenting judge and the Commission that the courts have to "read into" the federal statutes the requirement of valuable consideration ignores the statutory history of lotteries. The first anti-lottery act in Anglo-American law was the Act for Suppressing Lotteries, passed in 1698 (10-11 Will. III, c. 17, ss. 1-3). It referred to "mischievous and unlawful games, called Lot-

teries" and declared them to be common and public nuisances. It did not define the term; but the English courts have always held that payment of a price by participants is an essential element of a lottery.

It is just as unreal to talk about "reading" the requirement of consideration into a statute dealing with "lotteries" as it would be to talk about reading the requirement of consideration into a statute governing contracts, price into a statute dealing with sales, delivery into a statute applying to gifts, or signature and attestation into a statute relating to wills.

The courts do not have to "read into" the lottery statutes the requirement of consideration. It is already there in the word "lottery". One of the Commission's own authorities, Williams, *Flexible Participation Lotteries** (1938), p. 104, puts the point quite plainly:

"The English and federal forms are alike in that they do not mention consideration. However, this element is implied. *No court ever declared a game a lottery unless consideration was present.* In England it was so well known that any scheme or device for distributing prizes by chance was operated for a consideration, that the English didn't take the time to mention it in their definition."

The observation that the English do not even mention "consideration" in their definition of "lottery" is of interest.

*According to its preface, Williams' book was prompted by the Bank Night controversy; and it deals largely with the Bank Night cases. It also contains interesting historical material and analyses of the State constitutional and statutory provisions relating to lotteries.

The English cases define a lottery merely as "a scheme for distributing prizes by lot or chance".* Nevertheless, every English case cited by the Commission and all others on the subject that we have read—where they have involved the presence or absence of what the American courts call "consideration"—have turned on the question of whether the participants paid a *price* for their chances for the prize.

One who reads the almost interminable discussions of the problem of consideration in some of the Bank Night cases cannot but be impressed by the clarity of the English decisions and the brevity of their opinions. The English courts have not got into trouble over the different meanings of "consideration" because they do not use the word in relation to lotteries. They use "price" or "payment" or some equivalent; and so they have avoided the "confusion" which the dissenting judge (R. 135) has found in the American decisions.

The Commission, on page 42 of its brief, cites Halsbury for a reference to "indirect consideration". Its quotation is taken from a footnote. The text on the same page, *op. cit.* at 526 contains the following statement:

"But it seems that when the chances of a prize are obtained wholly gratuitously, and when, therefore, *none of the adventurers risks anything*, the scheme would not be a lottery." (citing *Willis v. Young* [1907] 1 K. B. 448, and *Barnes v. Strathern* [1929] S. C. (J) 41).

In *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, 697, the Lord Chancellor, Lord Selborne, considered it so obvious that the lottery statutes had reference to

*Halsbury, *op. cit.*, p. 525.

gambling transactions only, that he disposed of the point in one brief sentence.

BROOKLYN DAILY EAGLE CASE

In support of its assertion that in lottery cases "the ultimate financial benefit to the promoter" is the decisive test, the Commission cites *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579 (E. D. N. Y. 1910) and quotes from a passage in that opinion which, taken out of its context, might be read to support its argument. Read in the context of the facts before the Court the meaning is quite different.

The case involved an essay contest sponsored by a breakfast food manufacturer. Prizes were to be awarded for the "best" compositions, as determined by three impartial judges. The Postmaster barred from the mails all issues of the Brooklyn Daily Eagle containing the advertisement of the contest, on the ground that the standards were so vague that the prizes would be awarded by chance. The newspaper sought an injunction against the Postmaster, and the court granted it upon the ground that the contest was in reality one of skill.

The facts bearing on the question of consideration were that each contestant had to procure, and send in with his composition, three labels taken from packages of the sponsor's breakfast food. Thus the case is one which, if it were a radio contest, would fall within, or be closely akin to, those covered by the Commission's Rule (b)(1)—which is not in issue here—the case where the radio listener is required to be in possession of the sponsor's product in order to qualify for the prize.

While it is conceivable that some would-be essayist might go from door to door collecting empty cartons of the sponsor's breakfast food and thus obtain three labels without paying a price, obviously the normal way to get them is to buy three packages of the breakfast food; and in the lottery cases the courts assume that people will act normally, and they do not hold games of chance to be less than lotteries because there is a *possible way* of participating without paying. *Commonwealth v. Wall, supra*. Thus the bulk of the contestants in the breakfast food case could be assumed to have paid a price for their chances at the prize; and if the prizes had been awarded by lot, rather than on the merits of a composition, the scheme would clearly have been a lottery under the authorities.

So while the language of the court quoted on page 51 of the Commission's brief is somewhat loose—and the sentence "It is only necessary that the person entering the competition shall do something or give up some right" is too broad*—the meaning of the quotation as a whole is clear enough in the light of the facts of the case. Consideration did not have to be paid directly to the breakfast food manufacturer, but could be paid indirectly by purchase of his product in the stores. Acquisition of labels was sufficient, since it presupposed a purchase of the product. The manufacturer's sales having been increased because the contest stimulated people to buy his product, "based on a desire to get something for nothing", a part of the consideration *paid* by the contestants *went* into the coffers of the manufacturer who provided the prizes. The case does not help the Commission.

*The sentence, in addition to being too broad, is also quite irrelevant to the Commission's argument that profits to the promoter are the test of a lottery.

In its Appendix B the Commission lists "decisions holding bank night and kindred schemes illegal"; and it places reliance on what it calls "the majority Bank Night cases"—as if they supported its position before this Court. Actually, except for a small number of cases where the courts have accepted the "detriment to the promisee" and "benefit to the promisor" meaning of consideration as applicable to lotteries, all the cases in Appendix B are contrary to the Commission's argument, because they were decided on the premise that *valuable consideration* is necessary for a lottery.

BANK NIGHT CASES

A detailed discussion of the Bank Night cases would lengthen this brief unduly; but the Bank Night cases are so numerous, and in some respects so confusing, that an analysis of the Bank Night decisions on a broad basis may perhaps be helpful.

Bank Night was a promotional scheme for motion picture theatres. The courts divided as to its legality under the lottery statutes. Some of the cases were criminal prosecutions, in which the rule of strict construction was applicable, while others were civil cases,* which came up in a number of different ways (suits by the proprietor of Bank Night to recover royalties from "licensed" theatres, or to enjoin unlicensed ones from using the plan,** suits by com-

*Summing up the authorities as they existed in 1937, the Supreme Court of Minnesota said that in civil proceedings the courts had generally held Bank Nights illegal, but that in criminal proceedings the weight of authority was that they were not lotteries, because the requirement of consideration paid by the participants was missing. See *State v. Stern*, 201 Minn. 139, 275 N. W. 626, 628.

**In one such case, *Affiliated Enterprises v. Gantz* (10th Cir. 1936), 86 F. 2d 597, the court denied injunctive relief on the "clean hands" doctrine, holding that if the Bank Night scheme was not actually a lottery it was too closely akin to it to have the protection of a court of equity.

petitors and public authorities to enjoin the scheme as illegal, etc.). The judges who wrote the numerous opinions, majority and dissenting, revealed differing degrees of tolerance toward promotional schemes of chance. Finally, the facts on which the issue of consideration turned varied from case to case, in greater or less degree, because the plan was changed somewhat during its history and—which is more important—individual theatre operators did not adhere strictly to its terms but made changes to suit themselves—usually in a way that increased the chance of its being held to be a lottery.*

The most thorough analysis of the Bank Night scheme—as it was supposed to operate, and as it actually operated—is contained in a report entitled “Memorandum for the Postmaster General embodying a finding of fact and recommending the issue of a fraud order” submitted to the Postmaster General by Honorable Paul A. Crowley, Solicitor of the Post Office Department, in a departmental proceeding against Affiliated Enterprises, Inc., promoter of the Bank Night plan. We base our description of Bank Night on that report.**

According to testimony reviewed by Mr. Crowley in his memorandum, Bank Night was “invented” to circumvent a

*See page 24 *et seq.* of the Post Office Memorandum, referred to in the next footnote.

**For brevity we shall refer to Mr. Crowley's report as “the Post Office Memorandum”. Pursuant to Mr. Crowley's recommendations, an order was issued on February 14, 1936, barring Bank Night from the mails as a lottery. The order is annexed to the Post Office Memorandum. The full title of the proceeding is “In the Matter of charges that Affiliated Enterprises, Inc., at Denver, Colorado, is engaged in conducting a scheme for the distribution of prizes by lot or chance in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), and of 18 U. S. Code 336.”

provision of the NRA Motion Picture Code that prohibited theatres from giving away prizes. The inventor was advised by counsel that the provision would not apply if anybody who wanted to do so could participate in the prize drawing, without having to buy a ticket of admission to the theatre. According to the plan, a "licensed" theatre held a "Bank Night" once a week, on the evening (usually Wednesday) when experience showed attendance to be poorest. The participants in the drawing were all the persons above a minimum age who had gone to the lobby of the theatre and signed their names in a registration book, each one getting a number. Once a person did that, his number was in the drawing on all subsequent Bank Nights.

The drawing was held in the theatre at or about an appointed time on Bank Night, but it was not necessary for the holder of the winning number to be in the audience. He could be in the lobby, outside on the street, or anywhere nearby. His name was announced outside as well as inside the theatre. But it was a requirement that he be inside the theatre to claim the prize within a specified time, which was fixed by the particular theatre and varied from one to five minutes. If the winner was outside the theatre when his name was called, he could enter free, to claim his prize. If the winner did not claim the prize within the specified time, it was added to the prize for the next Bank Night.

Briefly, the argument against Bank Night was that its necessary effect, because of the way the plan worked out in practice, was to induce persons interested in the drawing of the prize to lay out money for tickets of admission to the theatre. The point was stated in *Commonwealth v. Wall*, *supra*, (3 N. E. 2d at 30) as follows:

"So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize. The jury could disregard all evidence introduced by the defendant favorable to him. They could take a realistic view of the situation. They were not obliged to believe that all the ingenious devices designed to legalize this particular game of chance were fully effective in practical operation. An important feature of the plan was the necessity that the person whose number was drawn should appear at once and claim the deposit. The time allowed for appearance was entirely within the control of the defendant. No definite time seems to have been fixed. A participant inside the theatre would have the advantage of immediate presence in a place of comfort. He could hear the number and the name read. He could identify himself at once. A participant outside the theatre must wait in discomfort in the hope that if his name should be drawn within he would be notified and would hear the call soon enough to crowd through toward the front of the theatre within such time as might be allowed. The object of the defendant was to fill the theatre, not the lobby or the sidewalk. We think the jury could find that the unusual crowds which completely filled the theatre on 'Bank Night' paid to come in partly because they had, or reasonably believed they had, a better chance to win the prize than if they had stayed outside, that they paid their money in part for that better chance, and that the scheme in actual operation was a lottery. There was no error in denying the defendant's motion for a directed verdict."

To the above description of the factors that induced would-be participants in Bank Night to lay out money for

admission to the theatre, the Post Office Memorandum, pp. 38-39, adds the following:

“The opportunity to actually see how the drawing is conducted and gauge at first hand whether it is fairly done, the thrill of hearing touching and amusing recitals as to how the lucky winner will use the prize money, is denied the persons who have convinced themselves that there is ‘something for nothing’, and remain outside.”

In most, if not all, of the cases which condemned Bank Night as a lottery, it was found as a matter of fact that many people did lay out money for a ticket to the theatre, not because they wanted to see the play but because they wanted to participate in the drawing of the prize; and the holdings of the cases were that the possibility of free participation did not remove the case from the lottery category. The fact that free tickets are given to some participants does not make the price paid by others any less a price for a chance at the prize. *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107 (1927).

Of the various positions that the courts have taken on the subject of Bank Night, that which is represented by the Massachusetts decisions appears to be the most sensible, and certainly the one most consistent with the authorities. It is, in substance, that whether a Bank Night scheme is a lottery, or a game with free participation, depends on how the scheme is operated, and that that question in a criminal case is for the jury. As the court said in *Commonwealth v. Heffner*, 304 Mass. 521, 24 N. E. 2d 508, 509:

“Perhaps it would be more convenient for law enforcement officers and for such proprietors of

theatres as care to use this kind of advertising if we could issue a pronouncement either that 'Bank Night' is a lottery or that it is not a lottery. But there is no peculiar law applicable to 'Bank Night' under which we can make a ruling of that kind. Each instance must be judged by the general principles of law relating to lotteries as applied to the facts which could be found upon the evidence and the permissible inferences from those facts. The facts and permissible inferences vary with time, method, and the physical arrangement of the premises. We can no more say that it can never be possible to operate the plan called 'Bank Night' so as wholly to remove the element of price paid for a chance from the admission fee charged those who enter than we can say that as a matter of law the plan is always free from that taint. It seems likely that the decision will commonly, though not always, rest in the domain of fact."

Since it is unnecessary for us to rely on those Bank Night cases which held, on the evidence before the respective courts, that the scheme was not in violation of the lottery statutes, we pass them with a brief comment. All of them, of course, stand for the proposition that a valuable consideration is an essential of a lottery. Some of them may not be reconcilable with the cases holding Bank Night illegal; some of them are. See, *e.g.*, the comment in *Commonwealth v. Wall*, *supra* (3 N. E. 2d at 30) on the case of *State v. Eames*, 87 N. H. 477, 183 Atl. 590, to the effect that in the *Eames* case "free participation was a reality" on the agreed statement of facts before the court, and the further comment that much the same could be said of *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608.

The cases upholding the Bank Night scheme* as lawful include some very respectable authority; and there is much that can be said on both sides of the question of whether it is a harmless form of advertising and entertainment or a pernicious gambling game. Not only courts but legislatures have viewed it as a legitimate advertising device.

SECOND THOUGHTS ON BANK NIGHT

The status of Bank Night in New Mexico is of interest. The Supreme Court of that State first upheld the plan as lawful in *City of Roswell v. Jones*, 41 N. M. 258, 67 P. 2d 286 (one judge dissenting). Later, in *State v. Jones*, 44 N. M. 623, 107 P. 2d 324, the *City of Roswell* case was overruled (two judges dissenting), on a reconsideration of the plan in the light of intervening decisions of other courts.

The dissenting judges pointed out that the history of lottery statutes in New Mexico was such that a liberal attitude on the subject was required, citing *Harriman Institute of Social Research v. Carrie Tingley C. C. Hospital*, 43 N. M. 1, 84 P. 2d 1088—a case in which, among other interesting observations, the court had remarked that lottery laws had to be interpreted “in the light of the local conditions, other existing laws and the customs of the people, in order to ascertain the intent of our legislature” (at 1094).

The intent of the New Mexico legislature was made manifest when it passed an amendment (Laws 1949, ch. 133), adding to the existing exemption for charitable raffles an exemption for motion picture theatres, and also

*Listed by the Commission in Appendix B of its Brief, pp. 74-75.

for county fairs offering prizes of livestock or poultry. The exemption in the present New Mexico statute (N. M. Stat. 41-2218) which applies to motion picture theatres is as follows:

“ . . . the provisions of the five preceding sections [the anti-lottery statutes] shall not apply to bona fide motion picture theaters which are, and for more than one [1] year have been, engaged in business at the same location in the state of New Mexico, and which shall offer prizes of cash or merchandise for advertising purposes in connection with such business, or for the purpose of stimulating business, whether or not any consideration, other than a monetary consideration in excess of the regular price of admission, is exacted for participation in such prizes or drawings, . . . ”

Thus the New Mexico legislature not only declared Bank Night to be lawful, but it gave its sanction also to prize awards limited to those who attend the theatre, which had been condemned in some other States as gift enterprises. *E.g.*, *State v. Danz*, 140 Wash. 546, 250 Pac. 37.

The legislature of Arkansas had previously passed a specific statute to legalize Bank Night and similar advertising schemes (Acts 1937, No. 238, § 1, p. 851; Stat. 1947, § 84-2209):

“Bank night or buck night—Certain kinds of advertising consisting of giving prizes made lawful.—The method of business advertising now or hereafter to be conducted in this State by the giving away of prizes consisting of money or other thing of value, where no payment of money or other thing of value is required of participants in such awards, whether such advertising plan be entitled, “Bank Night,”

"Buck Nite," or any other name whatsoever is hereby declared to be a legal form of advertising."

Kentucky has a similar statutory exemption (Ky. Rev. Stat. 1943, § 436.360) applying broadly to mercantile establishments, theatres and newspapers:

"(2) Subsection (1) of this section [the anti-lottery statute] shall not apply to any gift, money, property or anything of value which is awarded by lot or drawing by mercantile establishments, theatres or newspapers which make such awards to their customers, and which charge no price and collect no fee for the privilege of participating in such lot or drawing other than the regular price of merchandise sold, admission ticket or subscription price to all customers, whether or not they participate in the awarding."

Here again the legislature of the State has specifically legalized, not only prize drawings for which, as with Bank Night, free chances may be obtained, but also drawings that are limited to those who have paid a price for something—customers of the stores, patrons of the theatres and purchasers of the newspapers.

Montana has a similar exemption for the benefit of agricultural fairs and rodeo associations. (Mont. Rev. Code 1947, § 94-3002.)

Oklahoma has an exemption which permits resident merchants to issue, free of charge, numbered tickets on sales of merchandise and to award prizes by lot drawn by a representative of the Chamber of Commerce or commercial club of the city or town. (Okla. Stat. (1951) Title 21, § 1051.)

It is not only the legislatures that have had second thoughts on the subject of Bank Night, in its favor rather

than against it. The Supreme Court of Minnesota had condemned a Bank Night scheme as a lottery in *State v. Schubert Theatre Players Co.*, 203 Minn. 366, 281 N. W. 369. In 1950, after most of the other Bank Night cases had been decided, the problem came up again and the court, after full consideration of the authorities, held (two judges dissenting) that the Bank Night plan was not a violation of the Minnesota lottery statute. *Albert Lea Amusement Corp. v. Hanson*, 231 Minn. 401, 43 N. W. 2d 249.

The scheme in that case differed from the one outlined above in that, if a would-be participant called at the theatre during business hours on the day before the drawing or prior to 4 P. M. on the day of the drawing, he could obtain an "absentee card" which would entitle him to claim the prize at any time within 48 hours after the drawing. That distinction, however, does not appear to have been determinative. Whether it was or not, the court rejected the argument that anything less than payment of a price for a chance was consideration under the Minnesota lottery statute.

When Bank Night was taken out of the theatre and used to advertise a market, to which participants, without paying an admission fee, could go to register, then to qualify for the weekly drawing, and then to attend the drawing (as they had to do in order to win if their numbers were called), it was held not to be a lottery. *State v. Big Chief Corporation, supra*.

The Commission footnotes the *Big Chief Corporation* case in its Appendix B, calling it "A decision failing to determine the applicable legal test because of inadequate facts in the record". Nevertheless, the decision of the Supreme Court of Rhode Island is a square holding against the Commission's position on consideration.

The trial court on an agreed statement of facts, a jury trial having been waived, found that the scheme was a lottery because "many" persons attracted to the market by Bank Night were necessarily led "to make purchases; and that [their money thus spent] was spent not only for merchandise but for the purpose of participating in the bank night". The trial court applied what might be called the doctrine of "consideration by virtue of irresistible temptation".

The appellate court said it did not have to pass on the question of whether that doctrine was correct, because there was no evidence that many or even any of the participants had bought merchandise from the market because of their desire to participate in the drawings. The court then said (13 A. 2d at 242):

"For that reason and because the decision of the trial justice cannot be supported on any other line of reasoning which we consider sound, the decision is erroneous."

The court, therefore, necessarily decided that the facts in the agreed statement did not amount to lottery consideration, to wit, that a participant was required (a) to go to the market to register, (b) to go to the market again during the week of the drawing to have his registration card "qualified", and (c) to attend the drawing in order to win the prize if his number came up.

The opinion does not leave room for doubt that such was the holding, because the court specifically said (13 A. 2d at 239):

"It has been held in a few cases that the requirement of consideration is satisfied by any conduct

which would constitute consideration for an executory contract. See, for instance, *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242. *But this holding is against the very great weight of authority and we do not follow it in the instant case.*"

"On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value. *Commonwealth v. Wall*, 1936, Mass., 3 N. E. 2d 28."

The Bank Night cases do not help the Commission. Even those which went furthest in adopting without qualification the detriment and benefit theory—and the case that the Commission (Br. pp. 49-50) cites as "typical" in its reasoning perhaps went furthest of all—*Furst v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A. 2d 892, 893—found consideration in the money paid by those who bought admission tickets to the theatre in order to be in on the drawing.

In so far as those cases either adopt or give lip service to the detriment and benefit theory, they not only are contrary to the great weight of authority but subserve a doctrine that is unsound and, from the standpoint of proper administration of the lottery statutes to accomplish their purpose, dangerous as well.

Moreover, there is nothing in the radio give-away contests that is comparable to paying an admission price to get into a theatre on Bank Night.

GIFT ENTERPRISE CASES

In a gift enterprise, a person buys something and gets with it, without additional consideration, a chance for a

prize. Many cases have held that, even though the buyer gets "full value" for what he buys, a part of the price must be attributed to the chance, and for that reason such a scheme is a lottery. Those cases have no application to the case at bar, since the person who follows a give-away contest on the radio, even if he is a winner, does not get his chance as a result of buying *anything*.

One of the leading gift enterprise cases is *Horner v. United States*, 147 U. S. 449, upon which the Commission bases a curious argument. It sets up a straw man issue, as to whether the risk of "loss", "impoverishment" and "pauperism" is "the sole evil of lotteries" (Com. Br. 37-41). It argues that there could not be any loss to buyers of the Austrian bonds which had lottery provisions in them, because they were payable at any event at the end of 55 years, and with interest. Therefore, it says, impoverishment cannot be the test, and therefore again—if we follow the argument—payment of a price in money or equivalent value is not a requirement of a lottery.

We cannot believe that the Commission will seriously maintain before this Court that nobody could lose money on an Austrian bond issued in 1864 and maturing 55 years later (in 1919 when, as it turned out, the Austrian Empire had ceased to exist)—a bond upon which no interest was payable until redemption, and then only an amount which at its maximum was equal to 5% per annum for 20 years—so that in effect no interest at all was payable for the last 35 years of the life of the bonds not previously redeemed. Nor can we believe that the Commission will seriously contend that people might not be induced to buy such bonds, when they could not afford to do so, because of the gamble that they carried with them. The prizes were very large;

the luckiest bondholder in each drawing would receive, for a bond of the face value of 100 gulden, the sum of 250,000 gulden, or 2500 times the face value.

Of course, the test of a lottery is not whether it will result in "impoverishment" of the participants, though "impoverishment" has been referred to in statutes, in the cases, and generally in the literature of lotteries, as a disaster that may come to those who gamble in lotteries.* The test is whether people are induced to lay out money for a bond or article of merchandise which they would not buy except for the chance at the prize.

The other gift enterprise cases** require no comment. They apply familiar principles which, regardless of their merits, have no application in this case.

There remain the three cases cited on page 51 of the Commission's brief, of which it says that they are "closely similar to the case at bar". They are *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N. W. 491; *Knox Industries Corp. v. State ex rel. Scanland*, 258 P. 2d 910 (Okla. 1953); and *Maughs v. Porter*, *supra*.

Maughs v. Porter does not require comment, because it is dealt with at some length in the opinion of Judge Leibell in the District Court (110 F. Supp. at 386-87; R. 126-27) and we have nothing further to add. Judge Leibell pointed

*The Act for Suppressing Lotteries, *supra*, recited that the promoters of lotteries had "most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families".

**For example, *Bell v. The State*, 37 Tenn. (5 Sneed) 507; *United States v. One Box of Tobacco*, 190 Fed. 731 (4th Cir. 1911); *Rountree v. Ingle*, 94 S. C. 231, 77 S. E. 931.

out that the case had been severely criticized and had not been followed by other courts.*

KNOX INDUSTRIES CORP. v. STATE

Knox Industries Corp. v. State ex rel. Scanland, *supra*, was decided on the authority of *State ex rel. Draper v. Lynch*, 192 Okla. 497, 137 P. 2d 949—a case involving Bank Night. The *Draper* case is an example of the baleful influence that is sometimes exercised on busy courts by text writers who are special pleaders and have developed superficially plausible theories. Williams, *Flexible Participation Lotteries*, *supra*, was directed at Bank Night. Not content with attacking the scheme on the basis which the Post Office Department found sufficient, as well as most of the courts which decided against Bank Night, Williams in his book argued for the broadest revision of the definition of consideration as laid down in the lottery cases. He urged that at least six types of consideration could be found in Bank Night, including (in addition to the time and trouble involved in registering at the theatre), subjecting oneself to the theatre's sales appeal, the furnishing to the theatre without cost, through registration, of a useful mailing list, and the rendering of services by the participants to the theatre in the form of advertising, arising from the fact that they would tell "kin, comrades and acquaintances" about the theatre's Bank Nights. Williams, *op. cit.*, p. 133.

The Oklahoma court accepted that analysis and made use of it in the *Draper* case; but the court went Williams one better, by finding seven forms of consideration to Williams' six. The additional element which the court

*18 Va. Law Rev. 465; 80 U. of Pa. Law Rev. 744; 45 Harvard Law Rev. 1206; *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782, 788, and other cases cited by Judge Leibell.

found, relying on *Maughs v. Porter, supra*, was the benefit which the theatre operator derived from having the participants present in or near the theatre, over and above the monetary benefit derived from the admission prices received from the paying customers. That flight of fancy suggests the unlimited possibilities of the detriment and benefit analysis, as applied to advertising schemes involving prizes.

The *Knox Industries Corp.* case involved a free raffle of an automobile every 52 days by a company that operated a chain of automobile service stations. Tickets were given free to anybody who applied for one at any of the service stations. At every station there was a container in which the ticket stubs could be dropped before noon on the day of a drawing. The winning numbers were posted in each service station. To claim the prize, the winner had to appear in person at the main office of the defendant.

The Oklahoma Act (Okla. Stat. 1951, Title 21, § 1051) defined lottery in terms of "the disposal or distribution of property by chance among persons who have paid, or promised, or agreed to pay any *valuable consideration** for the chance . . ." The Oklahoma Supreme Court held the scheme to be a lottery, on the authority of the *Draper* case. It found consideration in the fact that participants had to go to the service stations of the defendant to get their tickets, to deposit the stubs in the container, and to ascertain the winning numbers, with the result that "all prospective participants are subjected to the sales appeal of the merchandise offered for sale at defendants' stores and stations"—the inference being that they could not resist the

*The case is further evidence of the fact that there is no correlation between the form of the State lottery statutes and the scope which the courts give to the meaning of "consideration."

temptation to buy things that otherwise they would not buy, and so in that manner there was what we have called consideration by virtue of irresistible temptation.

The *Knox Industries Corp.* case is perhaps the most extreme example of the doctrine that any detriment to the promisees and benefit to the promisor are sufficient to supply the requirement of consideration for a lottery. According to its reasoning, a lottery is present in any and every advertising scheme involving prizes, if it also involves trips by the participants to the advertiser's store. The decision is not only contrary to the great weight of authority, but it imposes a test that goes far beyond the community standards of right and wrong.

There are expressions in the opinions in cases under the lottery laws, which warn against the danger of too broad an interpretation of their prohibitions. The following wise observation was made by a New Jersey Court of Special Sessions in *State v. Horn*, 16 N. J. Misc. 319, 1 A. 2d 51, 53 (a Bank Night Case):

"My own viewpoint is that there should be the strict construction indicated in *State v. Hundling*, supra; and this because first, criminal statutes should be strictly construed, and secondly and more fundamentally, because there is a problem involved in the construction of our gaming statutes, infinitely more important than the narrow judicial proposition embraced within the four corners of a single issue. This problem is one social in character, and should not be ignored from the standpoint of realism. Our statutes in their essential terminology and application, are such as to create a situation whereby the casual or intermittent offender is brought before the court upon what may be an extremely narrow issue and if the cause is adversely decided as to him,

he is branded a criminal for the rest of his life, where there may be all around him violations apparently as obvious, going ignored.

"I am not able to look with complacency on a statutory situation or the construction of such, which serves no purpose except to breed disrespect for the law in its apparent inequalities, and promotes no good social purpose looking toward the control of the vice of gaming."

The views of the New Jersey court were quoted with approval in the concurring opinion of the Chief Justice in *State v. Jones, supra* (107 P. 2d at 331-2).

STATE EX REL. REGEZ v. BLUMER

State ex rel. Regez v. Blumer, supra, deals with a preposterous advertising scheme of a druggist. He put up a dollar a day for each of two daily raffles, after canvassing the city and procuring the names of several thousand persons who were willing to be contestants. No price was charged, but every contestant had to make a trip to the drug store every day and pick up a "daily card", without which he could not win in the next day's raffles even if his number came up. When a winner was not eligible for lack of a daily card, whatever was in the pot was added to the stake for the next day.

According to the complaint, the allegations of which the court said had been admitted by the defendant's demurrer (294 N. W. at 492):

"... the effect of the scheme is to get persons to go to the store and there purchase goods who would not have done so but for participation in the

scheme, and that the increased patronage thereby procured supports the scheme. It is also alleged that the continued operation of the scheme 'tends to demoralize winners' and results in 'injury to the habits and morals of the people of Monroe and the surrounding country; * * *"

It might be supposed that a wise court would have allowed the people of Monroe and the surrounding country to have their little day of foolishness, secure in the knowledge that all such schemes die a natural death because the public get tired of them—and that, if in the meantime some of the participants had bought their toothpaste, cigarettes or Hershey bars at defendant's drug store, it was a matter of little consequence.

It might also be supposed that a wise court would not take too seriously the tendency to demoralization and impairment of habits or morals from the winning of a dollar, ten dollars or twenty-five dollars in a raffle, when it is common knowledge that there are few communities in the country where raffles of everything from electric toasters to automobiles do not occur—sometimes under very respectable auspices—of Police and Fire Departments, churches, schools and hospitals. Of interest in this connection is a passage from the opinion of the Supreme Court of New Mexico in *Harriman Institute of Social Research, Inc. v. Carrie Tingley Crippled Children's Hospital*, *supra* (84 P. 2d at 1094) quoting an opinion of the Attorney General of that State dealing with "suit clubs"—a scheme by which 25 young men who need a new suit band together, and from time to time put into a pot enough money to buy a suit for one of them, the winner being determined by lot. Saying

that he could not escape the conclusion that the scheme was a lottery,* the Attorney General added the following:

"At the same time, bearing in mind the evil at which the legislation was aimed, it must be said that continuously, since the act was passed in 1889, there have been raffles, which are essentially lotteries, carried on in almost every town in the state without any interference from the authorities. Scarcely a week passes in any of our larger towns that there are not raffles of articles of property, for which chances are sold, and the winning party determined by lot. No attention has been paid to these infractions of the law, because public sentiment would not favor the enforcement of the statute against small schemes of this kind and, without the support of public sentiment, it is generally recognized that prosecutions under statutes of this class would be ineffectual."

The Wisconsin court in the *Regez* case, however, did not take into account any such practical matters, but chose to stretch its lottery statute to cover the druggist's raffles, holding that its decision in *State ex rel. Cowie v. La*

*Here is a scheme which, by the time the last man has his new suit, has served as a savings plan for all the participants—just as truly a savings plan as the "Christmas Club" of a savings bank. To construe it as a lottery is to bring under the lottery laws something that is not within their mischief; and it could be excluded from the category of lottery by a reasonable definition of prize—i.e., a holding that, because the plan calls for an award of a suit in due time to each member, there is not the unequal distribution of the "pot" that is sometimes referred to as a characteristic of a lottery, especially in the English cases. See XV Halsbury's *Laws of England*, p. 525 *et seq.*

We mention the point for the purpose of noting that the Commission has taken on a difficult judicial function—not only in deciding whether "consideration" and "chance" are present in an alleged lottery but also whether the element of "prize" is there also. We know of nothing in the Commission's record that would lead one to think that it has any special competence to decide such questions.

Crosse Theaters Co., 232 Wis. 153, 286 N. W. 707—a Bank Night case—was controlling, and saying (294 N. W. at 492):

“The trial court was of the opinion that the facts of the registrants’ going to the store each day to get the daily coupon and that the operation of the scheme paid the defendant or he would not operate it,* constitute a consideration. Consideration consists in a disadvantage to the one party or an advantage to the other. We here have both.”

The consequences of the two Wisconsin decisions are of special interest in this case:

In 1950, the District Attorney of Milwaukee County applied to the Attorney General of Wisconsin for a ruling as to whether certain programs that were being broadcast by radio stations located in his county were in violation of the Wisconsin lottery statute. Most of the programs were of local origin, but one of them was appellee’s TV network program “Stop the Music” (See R. 79-89). On the basis of the broad construction of “consideration” that the Wisconsin Supreme Court had adopted, the Attorney General ruled that the program in question did violate the statute. 39 O. A. G. (Wisc.) 374. In the course of his opinion he said, citing the above described Wisconsin cases, that:

“It is not necessary that the consideration be monetary or even that it be valuable to the promoter of the lottery. * * *

* * * * *

“That this entire scheme (“Stop the Music”—TV) is a lottery within the principles heretofore

*The equally plausible alternative—that the druggist’s method of advertising was idiotic, and very likely would do him more harm than good—seems not to have been considered.

stated in this opinion is too clear to require further comment."

Appellee retained attorneys in Wisconsin to take up the matter with the authorities and, if necessary, to file suit in the Federal court to enjoin the District Attorney from enforcing the statute as construed by the Attorney General.* The matter was brought to the attention of the Wisconsin legislature and a hearing before a legislative committee was held. A bill was then introduced in and passed by the Wisconsin legislature (Wisc. Laws 1951 ch. 436), amending the Wisconsin lottery statute (Wisc. Stat. § 348.01) by inserting the following specific exemption for give-away contests:

"(2) In order for a radio or television show or program to be held in violation of this section it shall be necessary to show that consideration involves either the payment of money, or requires an expenditure of substantial effort or time. Mere technical contract consideration shall not be sufficient. Listening to a radio, or listening to and watching a television show shall not be deemed consideration given or received."

The amendments of various state statutes as outlined above are evidence that the courts which in the Bank Night cases followed the Williams analysis, and either held or said that *any* detriment to the promisee or benefit to the promisor was sufficient to establish consideration for a lottery, not only departed from principles that had governed the interpretation of lottery statutes in England and this country

*As this and the following statement are only introductory in nature, we have thought it not improper to make them on the basis of the personal knowledge of the attorney and counsel for appellee.

since 1688,* but formulated a test that was unsound and impracticable, because in effect it branded as illegal a great variety of games and advertising schemes that most people do not consider anti-social or vicious, or within the intent of the gambling laws.

FISHING CONTESTS

The ruling of the Post Office Department which resulted in the amendment of the Federal lottery statutes to add thereto 18 U. S. C. § 1305,** exempting fishing contests, is a ludicrous example of a tendency to apply the lottery statutes beyond their reasonable scope. The ruling was that a fishing contest, where there was an entry fee, was a lottery if the prizes were awarded for performance that must depend "largely"*** on chance, such as a prize for the largest fish caught, because "the actual size of the fish caught depends on chance." See 2 U. S. C. C. S., 81st Cong. 2nd Sess. 1950, pp. 3010-11, in which a Senate Committee, adopting the report of a House Committee, submitted to the Senate the bill which became 18 U. S. C. § 1305. The Committee treated the matter in a somewhat humorous vein,

*That the Wisconsin legislature did not think that, in amending its statute, it was doing more than confining "lottery" to its proper meaning, as applied to a specific type of case, is shown by the fact that the Wisconsin Constitution (Art. IV, § 24) contains the following clear and absolute prohibition: "The legislature shall never authorize any lottery, * * *".

**"Section 1305. The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event."

***Cf. the rule prevailing under the English cases that "The distribution must depend wholly upon chance, and if the exercise of skill on the part of the competitors can, and does, contribute to success, the scheme is not a lottery, although chance may play a part in it." XV Halsbury's *Laws of England*, pp. 526-7 (citing and explaining the applicable English authorities).

but also expressed its judgment "that Congress, in enacting the lottery laws, never envisaged their application to such innocent pastimes as the typical fishing contest, which has a solid basis of respectability and wholesomeness removed from the reprehensible type of gambling activity which it was paramount in the Congressional mind to forbid."

It is common experience that fishing contests are not conducted by their promoters for eleemosynary purposes, but to bring people to summer resorts and fishing resorts and stimulate the business of the local hotels and stores. As the House Committee put it, such contests serve "the laudable aims of advertising the natural recreational advantages of the particular area, of attracting tourist trade to that area, and of promoting innocent community pleasure." The Commission in its brief lays stress upon the provision of § 1305 which limits the exception to fishing contests *not conducted for profit*. In the context of the Commission's argument, the implication is that if the promoters of the contest were to profit indirectly by an increase of business during the contest, and a later increase from the advertising of their resort, the fishing contest would not be within the exempting statute. But the Congressional Committees showed exactly what they had in mind in confining the exemption to contests not conducted for profit. They said (at p. 3011):

"We have in mind a self-liquidating type of undertaking, whose receipts are fully consumed in defraying the actual costs of operation and are not intended or used for any other collateral objects, no matter how benevolent or worthy."

Obviously the two Congressional Committees did not have any idea that under the lottery laws, construed as the

Commission says they should be, the fishermen who entered a contest suffered a detriment, which was sufficient consideration to make the contest a lottery if it was of benefit, as no doubt it would be, to the stores where the fishermen got their bait and such equipment as they might need, the hotels where they stayed, the service stations where they purchased their gasoline and the shops where they bought post cards and souvenirs for their families.

The Commission is before this Court asking for so broad a construction of § 1304 of the Criminal Code that it would be impossible to visualize the great variety of situations, heretofore thought not to involve wrongdoing, that it might bring within the scope of the lottery statutes. It is asking the Court to put that construction on the statutes without having before it any *evidence* as to the possible consequences of such a construction, or any *evidence* that radio give-away contests have any harmful effect on the public, and in spite of the following facts:

1. No case in the federal courts has ever adopted the construction that the Commission urges, or anything resembling it; and, so far as we know, no prosecution under the lottery laws on any such theory has ever been commenced.

2. The Department of Justice has refused to proceed against the type of programs to which the Commission now objects. For details as to various requests to prosecute made by the Commission and refusals to prosecute by the Department of Justice, see pars. 9-14 of the affidavit of G. B. Zorbaugh (R. 15) and the exhibits annexed thereto marked E-1 to J-2 (R. 30-63).

3. The Commission itself conceded in 1943 that it did not have power to proceed against give-away contests under the present statutes, and asked Congress to amend the statutes; but Congress did not do it. See Zorbaugh affidavit, par. 8 (R. 14) and Exhibit D (R. 27)—the letter from the Chairman of the Commission to the Chairman of the Interstate Commerce Committee of the Senate asking that the statute be amended and enclosing a suggested amendment (R. 30).

4. The *only* prior court decision on the question of whether a give-away contest violated the lottery laws held that it did not. *Clef, Inc. v. Peoria Broadcasting Co.* (C. C. Peoria County, Ill. 1939), an unreported opinion. See Zorbaugh affidavit, par. 4 (R. 13) and the complaint and opinion in that case, which are in Exhibit A to the affidavit (R. 16-23).

5. The rulings of the Solicitor of the Post Office Department under the postal lottery law are opposed to the interpretation of § 1304 that the Commission advocates. For rulings on the mailability of material relating to radio give-away programs, see pars. 5-7 of the Zorbaugh affidavit (R. 13-5) and Exhibits B-1 to C-2 thereto (R. 24-7). The rulings include one which is specifically addressed to appellee's program "Stop the Music", and is to the effect that material relating to it would not be regarded by the Post Office as "non-mailable under the postal lottery statute" (R. 27).

POINT II.

RULES (b) (2), (3) AND (4) ARE IN VIOLATION OF SECTIONS 307 (a) AND 309 (a) OF THE COMMUNICATIONS ACT, WHICH REQUIRE THE COMMISSION TO GRANT OR WITHOLD STATION LICENSES SOLELY ACCORDING TO THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

Congress has given the Commission but a single test to use in granting or withholding licenses or renewals of licenses for broadcasting stations. Under Sections 307(a) and 309(a) of the Communications Act, quoted in Appendix A, that test is "public interest, convenience and necessity."

In *Waite v. Macy*, 246 U. S. 606, 609-10, this Court pointed out, in a somewhat different situation involving standards of purity for tea, that under a statute charging an administrative body with the duty of determining "the fitness for consumption" of imported tea, one kind of impurity could not "be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do." In the District Court we argued by analogy that it was improper for the Commission to isolate the single factor of violation of the lottery laws and accord that factor supremacy in evil, without regard to any of the other considerations affecting public interest, convenience and necessity. The Commission replied to our argument by urging that "The public interest would be an empty concept if an applicant who proposes to violate the law through a practice of broadcasting lotteries could successfully demand a license for that purpose (sic) merely because his other programs will be legal or even highly desirable."*

*Reply Brief in the District Court, p. 11.

If everything that can be construed as a lottery were a heinous offense, essentially harmful to the public welfare, the Commission's answer might be plausible. But when the statute is susceptible to the kind of interpretation that it received from the Post Office Department in the case of fishing contests and when, according to the Commission, a lottery is present in a give-away contest if a person has to answer the telephone with a prescribed phrase which has been broadcast over another program, the reasons for an absolute rule cease to be apparent.

The Commission's argument might be more plausible also if every charge of a violation of the lottery laws was an open-and-shut case; but there will always be borderline cases where, in a prosecution under the criminal statute, it would be for the jury to find the facts which determine whether the game is one of chance and whether consideration has in fact been paid by those who participate. Cf. *Commonwealth v. Wall, supra*, and *Commonwealth v. Heffner, supra*.

Broadcast station licenses are valuable properties, and persons holding them will not, we think, either jeopardize their standing as broadcasters, or take the risk of prosecution for a crime, by broadcasting what they know is a lottery. The cases that will come up will be cases where there is a difference of opinion between the broadcaster and the Commission as to whether the program in fact constitutes a lottery.

A practical case may illustrate the undesirability, if not the absurdity, of the rule of thumb which requires the Commission to deny licenses when it finds that the station has been broadcasting or intends to broadcast a program that it may consider a lottery. We are informed that in the

vicinity of Boston there is an FM station, established by the Lowell Institute and operated by it in conjunction with a number of educational institutions, including Harvard University, Radcliffe College, Massachusetts Institute of Technology and others. Its primary purpose is to give the people of the Boston area the very finest reproduction of the finest music, as well as certain educational programs. Another purpose, we are informed, is to permit the radio and acoustical scientists of the cooperating universities to employ the station experimentally in the development of new and better devices for radio broadcasting and reception.

Let us suppose that a breakfast food company employs the facilities of the station to put on a morning program for housewives, in the nature of a prize quiz concerning the history of music and musicians; and that the questions on the quiz are based upon program notes given over the radio during the intermissions of performances of the Boston Symphony Orchestra—so that persons who want to be prepared with the correct answers, if called on the telephone, probably—perhaps certainly—will listen to the broadcasts of the Boston Symphony concerts.

If the Commission's rules are valid, the supposed program is clearly a lottery under Rule (b) (3). But would anyone with a sense of values assert that, when the license of the station comes up for renewal, the Commission by an absolute rule ought to put the station off the air, instead of following the normal process of complaining to the authorities charged with the enforcement of the lottery laws, so that the question at issue between the station and the Commission may be decided by the ordinary processes of law, rather than by administrative fiat? We submit that the question answers itself.

In the situation supposed, the Commission would be bound by its own rules to deny renewal of the license. While there are cases, such as *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223, where to protect and make effective its own powers the Commission by an absolute rule may deny a license to an offending station, the case before this Court is not that sort at all. The Commission has not been appointed by Congress as the agency charged with enforcing the lottery laws.

It is not enough to reply that the station that is denied a renewal of its license has a right to judicial review. The risk of losing its license on a construction of a disputed point of law would be too great for any broadcaster to take. See Complaint, pars. 12-15, reciting factual grounds for the claim of irreparable injury, which were admitted by the Commission and are the basis on which the injunction against Rules (b) (2), (3) and (4) was granted below (110 F. 2d at 378; R. 113).*

We submit that it is neither intelligent nor lawful administration for the Commission to isolate a single factor bearing on the issue of public interest, convenience and necessity, and to give it supremacy in evil over all others, regardless—in case of an alleged violation of § 1304—of how trivial or how unintentional the violation may be. For that reason alone it is submitted that Rules (b) (2), (3) and (4) are invalid.

The position which the Commission has taken in this case is quite contrary to that which it took in 1951 (and

*Under the statute the risk to the broadcaster is not only the denial of renewal of his license when the time for renewal comes, but also revocation of the license in the meantime, because it is expressly provided in the Communications Act, § 312(a), that the Commission may revoke a license on any ground that would be sufficient for denial of a renewal or an original application.

from which, so far as we know, it has never receded) in a proceeding before it, Docket No. 9572, entitled "In the Matter of Establishment of a uniform policy to be followed in licensing of radio broadcast stations cases in connection with violations by an applicant of laws of the U. S. other than the Communications Act of 1934, as amended." We quote from the Commission's Report in that proceeding, released March 29, 1951:*

"9. The contention has been made by parties in the proceeding that *no blanket policy* should be adopted by the FCC which would *absolutely disqualify* applicants for radio facilities where they are found to have violated a federal law or which would attempt to specify the exact weight or significance to be given by the Commission to such violations. Such evaluations, it was argued, should be made only on a case-to-case basis in the light of the specific facts involved in and related to the violation. *We are in general agreement with this contention.* As mentioned above, the Commission must be satisfied that an applicant has the requisite qualifications to assure that public interest will be served by a grant of his application. This determination cannot be made on the basis of isolated facts *but should include a careful, critical analysis of all pertinent conduct of the applicant.* We believe, that if an applicant is or has been involved in unlawful practices, *an analysis of the substance of these practices must be made to determine their relevance and weight* as regards the ability of the applicant to use the requested radio authorization in the public interest. *We do not believe that the outcome of this determination should be prejudged by the adoption*

*We note here again that all emphasis in quotations in this brief is ours.

of any general rule forbidding any grant in all cases where unlawful conduct of any kind or degree can be shown. Nor do we believe that any rule could adequately prescribe what type of conduct may be considered of such a nature that in all cases it would be contrary to the public interest to grant a license.

* * * * *

"11. It has been urged upon us that the violation of a U. S. law per se raises no presumption adverse to an applicant. With this point of view we do not agree. Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate radio facilities as a trustee for the public. This is not to say that a single violation of a Federal law or even a number of them necessarily makes the offender ineligible for a radio grant. There may be facts which are in extenuation of the violation of law. Or, *there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest.* In all such cases, a matter of prime concern is whether the violation was committed inadvertently or wilfully. Innocent violations are not as serious as deliberate ones."

It would be an absurdity to say that there can be under other laws, but not under the lottery laws, "favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest."

POINT III.

RULES (b) (2), (3) AND (4) ARE INVALID AS IMPOSING CENSORSHIP ON BROADCASTING STATIONS, CONTRARY TO THE FIRST AMENDMENT AND CONTRARY TO SECTION 326 OF THE COMMUNICATIONS ACT.

In the opinion below, the court held that Rules (b) (2), (3) and (4) were in violation of the First Amendment because they went beyond the scope of § 1304, but that, since the First Amendment "does not shield either the individual or the press, or any media for the communication of thought, from the application of criminal laws designed for the protection of the general public", Rules (a) and (b)(1) did not violate the right of free speech (110 F. Supp. at 389). The court went on to say, quite aptly, that the merits of give-away contests were not involved, because even if it could be said that "We can see nothing of any possible value to society" in those programs, "they are as much entitled to the protection of free speech as the best literature" or music, citing *Winters v. People*, 333 U. S. 507.

It is submitted that the censorship which the Commission has expressed its intention of imposing on give-away programs is in violation of the First Amendment. *Superior Films, Inc. v. Department of Education*, decided January 12, 1954, U. S. L. W. 3193.

But if that were not so, the prohibition of § 326 of the Communications Act would still be applicable. When the lower court applied to our argument under § 326 the same line of reasoning that it applied to the First Amendment question (110 F. Supp. at 384-385, R. 123), it is submitted that it was overlooking the fact that the first clause of

§ 326 is an *absolute prohibition* against *any* censorship of radio programs by the Commission. That section provides:

“§ 326. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

The Commission has frequently disclaimed the power to impose previous restraints on radio programs. In defining its responsibilities in connection with the granting and withholding of licenses, the Commission has laid down the principle that it is not concerned with the specific contents of any radio program, but only with the “overall program service” rendered by the station to the public. F. C. C. Blue Book Report, March 7, 1947, “Public Service Responsibilities of Broadcast Licensees”, p. 11. It has argued only that § 326 does not prevent it from considering “overall program service” in determining whether to renew a station license, because it does that after the event and never imposes “previous” restraints. The following are quotations from briefs of the Commission:

“... official regulation cannot be effected by requiring, as a condition precedent to the right of operation, the submission of broadcast material to, and approval by, the Commission.” Brief (p. 25) in *KFKB Broadcasting Association, Inc. v. Federal Communications Commission*, 47 F. (2d) 670 (App. D. C. 1931).

“... The Commission’s decision does not involve any official disapproval, expressed or implied, of the

specific content of any radio programs or types of radio programs, . . . no previous restraint in the broadcast of any program or types of programs is created by the action of the Commission in this case which would bring it within the constitutional limitations set out by the Supreme Court in *Near v. Minnesota*, 283 U. S. 697." Brief (p. 6) in *Simmons v. Federal Communications Commission*, 169 F. (2d) 670 (App. D. C. 1948).

The same disclaimer was made in testimony given by a former Chairman of the Commission, before the Senate Committee on Interstate and Foreign Commerce in 1947 on the White Bill (S. 1333), p. 58. He said that an amendment to § 326 therein proposed

" . . . makes explicit what is now implicit, namely, that there is a distinction between censorship of radio program material, in which the Commission does not and should not indulge, and the consideration of the overall service of a station, including its program service, in determining whether a station has operated in the public interest."

The Commission favored the proposed amendment of Section 326, which by a specific proviso made clear that the Commission could consider overall programming in determining whether a licensee had operated in the public interest. The amendment which appeared in the White Bill also restated the prohibition of the first clause of Section 326 in the following words:

"The Commission shall have no power to *censor, alter, or in any manner affect or control* the substance of any material to be broadcast by any radio broadcast station licensed pursuant to this Act, * * *"

We do not believe that the words "alter, or in any manner affect or control", add anything to the prohibition against censorship, since the word "censor" embraces them. They do suggest, however, that Senator White and his Committee were insisting, in 1947, that by no possible construction could the Commission use its licensing powers to impose previous restrictions on programs.

The Committee, in its report on S. 1333 (No. 1567, 80th Cong., 2nd Sess.), declared that "the Commission has absolutely no power of censorship over radio communications" (p. 14). With reference to the proposed amendment of § 326 it said, quoting Senator White (*ibid.* p. 15):

"The proposed language of this section does not take away the Commission's authority to make a finding whether or not a licensee has operated in the public interest; it is, in fact, affirmed. But it also makes clear that *the Commission does not have the authority to tell a licensee directly or indirectly, what he can broadcast, or how he should run his day-by-day business.*"

Rules (b)(2), (3) and (4) are not consistent with the views expressed by the Commission's then Chairman, by Senator White, and by the Senate Committee when the White Bill was under consideration. Nor are they consistent with the other views expressed by the Commission, and quoted above, with reference to its function in relation to the content of radio programs.

The Commission cannot derive its power to impose previous restraints from the fact that the programs which it proposes to interdict are, according to its view of the law, violations of "criminal laws designed for the protection of the general public." (110 F. Supp. at 389; R. 129). The

statute involved in *Near v. Minnesota*, 283 U. S. 697, also was aimed at acts that were violations of criminal statutes.

Nor can the power to make rules for administration of the Act—either under §4(i), where the test is that they are “necessary in the execution of its functions”, or under 303(r), where the test is that they are “necessary to carry out the provisions of this Act”—override the express prohibition of §326. It is not necessary for the Commission to make rules for the enforcement of §1304, since that is the function of the Department of Justice and, if the broadcaster uses the mails in promoting the alleged lottery, the function of the Postmaster General to the extent of the power given to him under the postal laws (39 U. S. C. § 259). Nor is there any other provision of the Act that makes it necessary for the Commission to impose previous restraints on programs alleged to be lotteries.

Section 1304 provides its own penalties. It provides, we submit, all the penalties that Congress intended to establish for the offense therein defined. The penalties are heavy—up to \$1,000 fine and one year imprisonment for each day on which a broadcaster violates the Section. We contend that the Commission does not have the power to add to those penalties—which may be imposed only “upon conviction”—a previous restraint on the broadcaster’s programs or, in the alternative, the loss of his license and consequent destruction of his business.

Had the Congress intended to give the Commission the power to enforce the lottery law, or any other law, by imposing a previous restraint on the use of a radio channel for broadcasting, it could readily have done so in specific terms, and in the light of a long and familiar precedent; for since 1872 the postal laws have conferred on the Post-

master General the power to impose a previous restraint on the use of the mails for lotteries and other gambling schemes. *Public Clearing House v. Coyne*, 194 U. S. 497; 39 U. S. C. §§ 259, 732. Congress has never conferred upon the Federal Communications Commission any power comparable to that possessed by the Postmaster General under the postal laws.

The failure to confer that power, combined with the clear prohibition contained in § 326, justifies the conclusion that Congress did not intend to vest in the Commission any power to censor radio programs—and certainly not a power to interdict in advance, by a series of sweeping general rules, a broad category of programs, upon pain of loss of the offending broadcaster's license.

Radio is entitled to all the protections of the First Amendment. *Superior Films, Inc. v. Department of Education, supra*. In addition, it is entitled to the protection of the specific prohibition of § 326. Rules (b)(2), (3) and (4) are a violation of both the First Amendment and § 326 of the Act.

POINT IV.

FAILURE OF APPELLEE TO APPEAL FROM THE JUDGMENT SUSTAINING RULES (a) AND (b)(1) DOES NOT PRECLUDE IT FROM RAISING THE ARGUMENTS SET FORTH UNDER POINTS II AND III.

The Commission in its brief (at pp. 19-20) takes the view that certain broad issues which we raised and argued in the lower court cannot be raised in this Court, because of our failure to appeal from the unanimous opinion of the lower court sustaining the Commission's view of those

issues. We agree, of course, that we cannot ask this Court to enlarge the judgment in our favor, and that injunctive relief against paragraphs (a) and (b)(1) is no longer available to us.

We contend, however, that we are entitled to urge upon this Court any and every ground for the invalidity of Rules (b)(2), (3) and (4), even though the same arguments might invalidate Rules (a) and (b)(1), if their validity were before the Court.

Appellee did not appeal from the judgment sustaining Rules (a) and (b)(1), because they do not apply to *any* of its programs. Not because of the Rules, but because of the statutory law, appellee has never broadcast and does not intend to broadcast any program that is within, or might reasonably be held to fall within, the description of Rule (a), now that its definition of a lottery has been restricted by the invalidation of Rules (b)(2), (3) and (4). Nor has appellee, so far as we know, ever broadcast any program falling within the description of Rule (b)(1); and appellee does not have any present intention to broadcast any such programs in the future.

Before the District Court we attacked the Rules as a whole, though our objection to subdivision (1) of Rule (b) was limited to a matter of wording which might permit the Rule to be construed too broadly. We attacked Rule (a) because the word "lottery", as therein used, imported the specific definitions of Rules (b)(1) to (4). But once the District Court had stricken Rules (b)(2), (3) and (4), Rule (a) was limited to a description of the offense in the words of the statute, qualified only by Rule (b)(1). The result was that the decision of the District Court left us in a position where we could no longer maintain that we

would suffer irreparable injury from the enforcement of Rules (a) and (b)(1), not having, or being likely to have, any programs falling within those Rules as construed by the District Court.

It did not seem appropriate, therefore, to appeal from the judgment of the District Court sustaining Rules (a) and (b)(1), even assuming that we had the right to appeal from provisions of a judgment with respect to which we could not make out a showing of irreparable injury, which is at best a doubtful question. *Cf. Pennsylvania v. West Virginia*, 262 U. S. 553, 593; and see *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324.

As we read the authorities, we have in this Court the right to urge against Rules (b)(2) to (4) any and every matter appearing in the record, or justified by the decided cases, including matters that might also be addressed to Rules (a) and (b)(1) if they were before the Court.* *Le Tulle v. Scofield, Collector of Internal Revenue*, 308 U. S. 415 (1940) and the authorities which it cites establish our right in that regard. There the Collector had assessed a tax on the ground that a series of transactions, involving transfers to a corporation of property of an individual and property of another corporation controlled by him, was not a tax free reorganization, and that the individual was therefore taxable as on a sale or exchange. The taxpayer sued for a refund and the District Court decided for the taxpayer, holding that the reorganization was tax free, so that no

*". . . it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *U. S. v. American Ry. Exp. Co.*, 265 U. S. 425, 435.

gain or loss could have been realized by him. The Collector appealed. The Court of Appeals reversed in part, holding that there was a tax free reorganization in respect of the properties that came from the corporation but not in respect of the properties that came from the individual; hence that he was taxable on gain realized on the latter group of properties.

The taxpayer obtained a writ of certiorari but the Collector did not apply for certiorari. Thus the issue before this Court was only whether there was a tax free reorganization in respect of the properties that came to the acquiring company from the individual taxpayer.

Before this Court the Collector argued that, because the taxpayer had come out of the series of transactions with only bonds and cash, and without any equity interest in the acquiring company, there was no tax free reorganization at all, with respect to either group of properties that had been transferred. Thus the Collector's argument—insofar as the corporate properties were concerned—was contrary to the decision of the Court of Appeals from which he had failed to appeal. This Court said that the judgment as modified by the Court of Appeals could not be enlarged to impose any additional tax on the plaintiff; but nevertheless it accepted the Collector's argument and decided the case on that basis, holding that there was no tax free reorganization at all, and noting that, if the Collector had appealed, the liability of the taxpayer would have been much larger. Upholding the right of the Collector to make the broad argument that he had made, in spite of his failure to appeal from the decision of the Court of Appeals, the Court laid down the applicable rule as follows (at pp. 421-22):

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him."

We submit that *Le Tulle v. Scofield* and the cases which it cites clearly establish our right to assert, in support of the judgment holding Rules (b)(2), (3) and (4) invalid, any ground that the record and the authorities justify, even though the same grounds might equally invalidate Rules (a) and (b)(1) if we had appealed and the Court were to sustain the appeal despite the fact that Rules (a) and (b)(1), if properly construed, do not affect appellee.

CONCLUSION

Rules (b)(2), (3) and (4) are based upon a construction of § 1304 of the Criminal Code for which there is no justification in either reason or authority, and which would have the effect of extending the federal lottery laws to cases that have never been considered to be within the mischief of the laws against gambling. The construction of § 1304 of the Criminal Code that the Commission urges is contrary to the construction that has been put upon the lottery statutes by all of the courts and the agencies charged with enforcement of the lottery laws.

The action of the Commission in setting up an absolute test, that disregards all other factors bearing on the public interest, convenience and necessity, and makes one single factor determinative of whether a broadcaster shall have

a license, is not only unsound and unintelligent administration of the statute but is contrary to its specific terms.

Rules (b)(2), (3) and (4) impose a form of censorship of radio programs, and constitute a previous restraint on speech of the most sweeping character, contrary not only to the First Amendment but to the specific prohibition contained in § 326 of the Communications Act.

The judgment of the District Court should be affirmed.

Respectfully submitted,

ALFRED McCORMACK,
Attorney for Appellee

G. B. ZORBAUGH
GEORGE B. TURNER
CHARLES MYNEDER
CLOYD LAPORTE, JR.
Of Counsel

January 25, 1954

BLEED THROUGH-

APPENDIX A

Relevant sections of the Communications Act of 1934, as amended (48 Stat. 1064 *et seq.*; 50 Stat. 189; 66 Stat. 715; 47 U. S. C. § 151 *et seq.*):

SECTION 4(i):

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

SECTION 303(r):

Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SECTION 307(a):

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

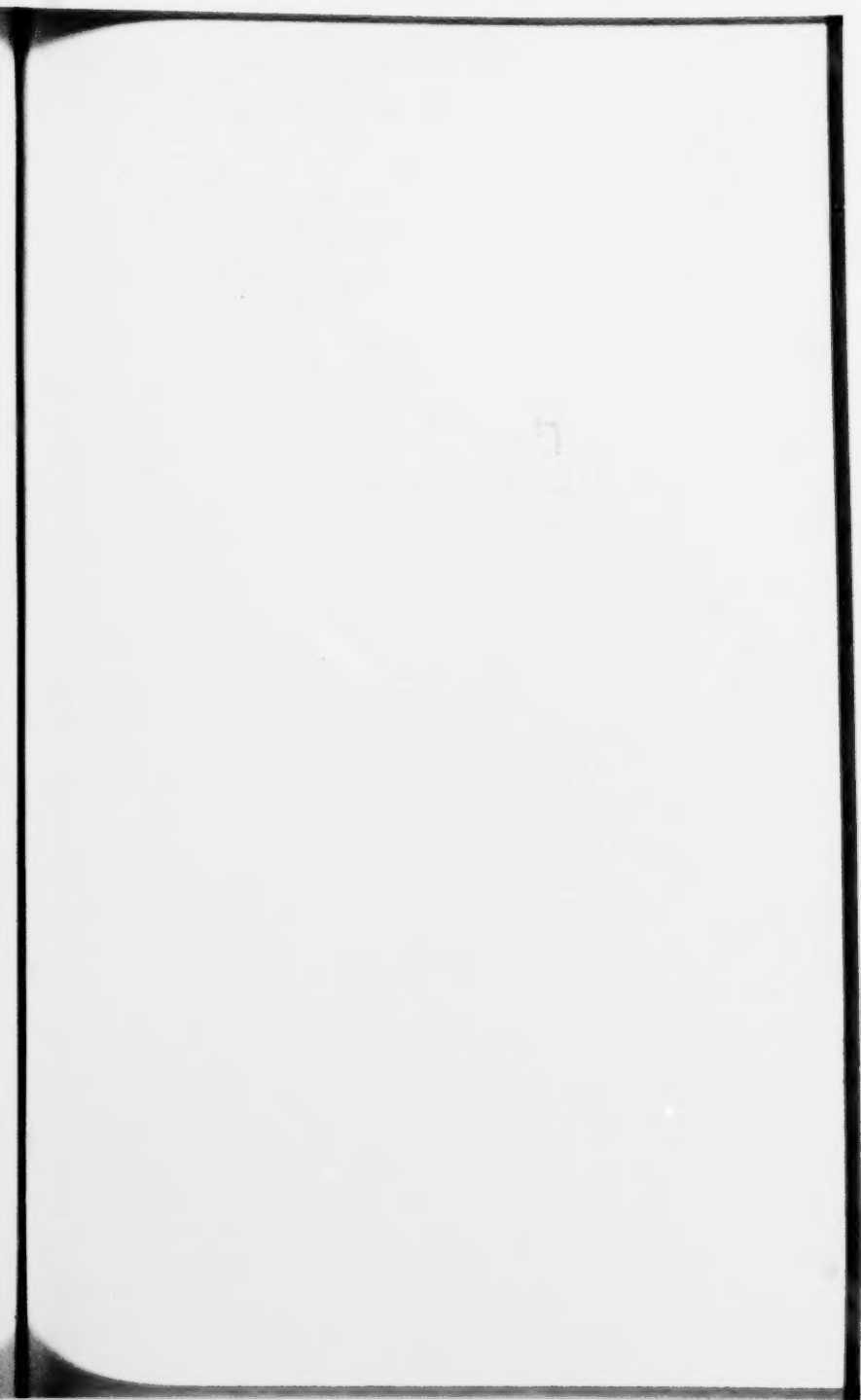
SECTION 308(b):

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of

the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SECTION 309(a) :

If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.



**In the United States District Court for the
Southern District of New York**

Civil Action No. 52-37

NATIONAL BROADCASTING COMPANY, INC.,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT, FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANT-
APPELLANT

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, the Federal Communications Commission respectfully submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on March 11, 1953.

OPINIONS BELOW

The Report and Order of the Federal Communications Commission is not yet officially reported. It may be found in Vol. I, Part 3, Pike & Fischer R. R. 91:231. The majority and dis-

(1)

senting opinions of the United States District Court for the Southern District of New York are not yet reported. Copies of these documents are attached hereto.*

JURISDICTION

The judgment of the specially constituted, three-judge district court, sustaining in part and setting aside in part the rules adopted by the Federal Communications Commission, was entered on March 11, 1953. A petition for appeal is presented herewith on May 8, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *National Broadcasting Company, Inc. v. United States*, 319 U. S. 190; *Radio Corporation of America v. United States*, 341 U. S. 412.

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission

*(Clerk's Note.—These opinions are printed as appendices to the Statement as to jurisdiction in *F. C. C. v. American Broadcasting Company, Inc.*, No. 117, October Term, 1953 and are not reprinted here.)

represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which prohibits the broadcast of lotteries. The question presented on this appeal is:

1. Whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTES INVOLVED

18 U. S. C. 1304 and pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*, are set forth in the Appendix hereto.*

STATEMENT

The plaintiff-appellee, National Broadcasting Company, Inc., is the licensee of radio and television broadcast stations subject to regulation by the Federal Communications Commission. On August 18, 1949 the Commission adopted a Report and Order, released August 19, 1949, adopting new Sections 3.192, 3.292 and 3.656¹ of its Rules and Regulations (14 F. R. 5432). These rules, which are identical, apply to commercial standard

*(See clerk's note, page 2.)

¹ Section 3.656 was originally Section 3.692. It was re-numbered by the Commission's Sixth Report and Order in Docket No. 8736, *et al.*, adopted April 11, 1952 (17 F. R. 3905).

broadcast (AM), FM broadcast, and television broadcast stations, respectively. They were adopted after rule making proceedings conducted in conformity to the provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), including notices of proposed rule making, the submission and consideration of briefs and written comments by a number of parties of which appellee was one, and oral argument before the Commission *en banc*, in which appellee also participated.

In its Report and Order adopting the foregoing rules, the Commission recognized that Section 1304 of the Criminal Code, which prohibits the broadcast of lotteries and similar schemes, is a declaration by Congress directly applicable to exercise of the Commission's power and duty to grant broadcasting licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcasting licenses. The rules provide:

Lotteries and Give-Away Programs.—

- (a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue

to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304.)

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer

to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellee brought the present action in the United States District Court for the Southern District of New York, under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321-5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009,² seeking

² Public Law 901, 81st Cong., 2d Session, 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under Section 402 (a) of the Communications Act to provide

a permanent injunction against enforcement of the rules. The district court granted a temporary restraining order, after which the Commission issued an order suspending the effective date of the rules pending a final determination of the action. The action was heard by the district court (the argument being consolidated with the argument in two companion actions brought by American Broadcasting Company, Inc. (now American Broadcasting-Paramount Theatres, Inc.) and Columbia Broadcasting System, Inc.) on cross motions for summary judgment. The district court handed down its decision on February 5, 1953, sustaining the Commission's authority to adopt the rules and the interpretation of 18 U. S. C. 1304 contained in the rules, with the exception of subdivisions (2), (3), and (4) of paragraph (b) of the rules. These subsections delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize. The majority of the district court held, Circuit Judge Clark dissenting, that 18 U. S. C. 1304, which the rules interpret, requires the payment of a price or thing of value as the consideration element of a lottery.

for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present one, which were commenced prior to its enactment. Section 14.

Judge Clark, dissenting, ascribed the majority's view to—

* * * the odd mistake that what is involved as the “price” or “valuable consideration” (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value “to the station or sponsor,” but “It is the value to the participant of what he gives that must be weighed.” Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even “a cent,” see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a

penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recognized in the well reasoned cases, such as *State v. Wilson*, 109 St. 349, 196 A. 757, cited below.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves the validity of rules of the Federal Communications Commission with respect to the licensing of commercial television and radio stations which have a significant impact upon the regulations and conduct of all such stations in the United States. Moreover, the rules rest upon an interpretation of a Federal criminal statute upon which the district court divided, and which should receive the definitive consideration of the Supreme Court.

As the record of this case shows, the so-called give-away programs, which offer prizes to members of the home audience as a means of inducing attention to radio and television advertising, have had recurrent periods of great popularity running back at least as far as 1940. During this period they have also been a matter of concern to the Federal Communications Commission, particularly in view of Section 1304 of Title 18,

United States Code (formerly Section 316 of the Communications Act), which specifically makes the broadcast of a lottery a criminal offense. In view of the importance of the problem to administration of the Communications Act and the uncertainty in which licensees found themselves due to the lack of decisive Federal precedents and extreme confusion among state courts in interpreting state antilottery statutes, the Commission undertook rule-making proceedings in aid of its licensing functions in order to clarify the responsibilities of broadcast licensees in this field in advance of individual licensing proceedings. The rules here at issue are the outcome of these proceedings.

The Supreme Court ruled upon the substances of the Federal antilottery statutes in the leading case of *Horner v. United States*, 147 U. S. 449. In that case a scheme under which the Austrian Government sold bonds, each bond being accompanied by a ticket entitling the holder to a chance in a drawing for the distribution of large sums of money, was found to be an illegal lottery.³ Since that time the various state antilottery statutes and the Federal laws have been interpreted in a great number of decisions bearing on the problem involved in this appeal of what constitutes sufficient consideration to make a scheme a

³ In *Federal Trade Commission v. Keppel*, 291 U. S. 304, the use of a lottery device in selling a product has been condemned as unfair competition.

lottery. The result of these diverse decisions under diverse statutes is considerable confusion, collection of the cases becomes a "barren task", as Judge Clark stated in his dissent in the court below. The decided cases may be generally catalogued as those requiring a valuable consideration paid directly for the chance to win a prize (see, e. g., *Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Ct. of Civ. App., Texas)) and those recognizing that a substantial benefit to the promoter which flows from the participants, and is necessary in order to have an opportunity to win, is sufficient to stamp the scheme a lottery (see, e. g., *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A. 2d 257; *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581 (C. C. E. D. N. Y.); *Affiliated Enterprises, Inc. v. Gantz*, 86 F. 2d 597, 599 (C. A. 10)).

Judge Clark in the court below concisely put the purpose of 18 U. S. C. 1304 when he said,

Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as

the initial and leading case of *Horner v. United States*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.

The programs covered by the rules at issue are lotteries by every realistic standard. "Give-away" programs are obviously not eleemosynary affairs, but are founded upon an expected return in profits to the sponsor and increased sales of radio time on the part of the station. The requirement of a prepaid monetary consideration as an essential element of a lottery, a requirement not in terms found in 18 U. S. C. 1304, is an unrealistic test. The radio stations involved and the promoters of give-away schemes receive tangible benefits from the increased audience lured by hope of winning a prize by chance.

It is submitted that the court below erroneously construed Section 1304, Title 18, U. S. C., and that its decision presents a substantial question of general importance in the regulation of radio

and television stations by the Federal Communications Commission.

Respectfully submitted.

✓ Benedict P. Cottone,
 ✓ BENEDICT P. COTTONE,
General Counsel,
 ✓ J. Roger Wollenberg,
 ✓ J. ROGER WOLLENBERG,
Assistant General Counsel,
 ✓ Daniel R. Ohlbaum,
 DANIEL R. OHLBAUM,
Counsel,

Federal Communications Commission.

Dated May 8, 1953.

JUN 12 1953

HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 118

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

✓ PAUL W. WILLIAMS,
Counsel for Appellee.

THOMAS E. ERVIN,
DUDLEY B. TENNEY,
Of Counsel.

BLEED THROUGH-

INDEX

SUBJECT INDEX

Motion to affirm	Page 1
Statement	1
Argument:	
1. The decision of the District Court is in accord with the overwhelming weight of authority	3
2. The intent of Congress was that Section 1304 should be construed in accordance with the existing law	8
Conclusion and prayer for affirmance	10

TABLE OF CASES CITED

<i>American Broadcasting Co. v. United States</i> , 110 F. Supp. 374	3
<i>Commonwealth v. Wall</i> , 295 Mass. 70, 3 N.E. (2d) 28	6
<i>Eastman v. Armstrong-Byrd Music Co.</i> , 212 Fed. 662	4, 8
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, stay refused per curiam on opinion below, 192 F. (2d) 240	5
<i>Peek v. United States</i> , 61 F. (2d) 973	8
<i>People v. Burns</i> , 304 N.Y. 380, 107 N.E. (2d) 498	6
<i>People v. Shafer</i> , 160 Misc. 174, 289 N.Y. Supp. 649, 273 N.Y. 475, 6 N.E. (2d) 410	7
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773, 241 U.S. 675	4, 6, 8
<i>State v. Big Chief Corp.</i> , 64 R.I. 448, 13 A. (2d) 236	6
<i>State v. Eames</i> , 87 N.H. 477, 183 Atl. 590	6
<i>State v. Stern</i> , 201 Minn. 139, 275 N.W. 626	6
<i>United States v. Halseth</i> , 342 U.S. 277	9

STATUTES CITED

Communications Act, Section 316	8
Criminal Code:	
Section 1301-1303 (18 U.S.C. 1301-1303)	8
Section 1304 (18 U.S.C. 1304)	2, 8

	Page
Laws of March 2, 1895, c. 191, 28 Stat. 963	8
Laws of March 4, 1909, c. 321, Sections 213, 237, 35 Stat. 1129, 1136	8
Order of the Federal Communications Commission:	
Paragraph a	2
Paragraph b(2)	4
Paragraph b(3)	4
Paragraph b(4)	4
Pickett, "Contests and the Lottery Laws," 45 Harv. L. Rev. 1196, 1205	5
Pike & Fischer, Radio Regulation, Vol. I, Pt. 3, Page 9191 :231, 91 :235-6	2, 4
Revised Statutes:	
Section 3894	8
Section 3929	8
Section 4041	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 118

FEDERAL COMMUNICATIONS COMMISSION,

v.

Appellant,

NATIONAL BROADCASTING COMPANY, INC.

MOTION TO AFFIRM

Appellee, National Broadcasting Company ("NBC"), pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed.

Statement

NBC is engaged in sound and television broadcasting and in sound and television network broadcasting. It is licensed by the Federal Communications Commission (the "Commission") to operate five standard broadcast stations, five frequency modulation broadcast stations and five television broadcast stations. In addition, it furnishes network programs to a considerable number of additional stations, commonly known as affiliates.

On August 18, 1949, the Commission adopted by 3 of its

7 members (of the other 4 members, 1 dissented and 3 did not participate) an Order (herein called the "Order") adopting rules with respect to the broadcast of certain types of programs. These rules provided that all applications in connection with the operation of a broadcast station (including license renewal applications) would be denied if the applicant proposed to follow or had followed a policy of allowing the broadcast of defined types of programs.

In its Report supporting the Order¹ the Commission took the position that the programs which it proposed to prohibit violated Section 1304 of the United States Criminal Code, Title 18 U.S.C., which makes the broadcasting of lottery information a misdemeanor. The Order itself incorporated in its paragraph (a) the language of Section 1304 as its principal definition of the prohibited programs; paragraph (b) of the Order, however, went on to set forth detailed criteria which the Commission intended to follow "in any event" in determining which programs were illegal. These detailed criteria made it apparent that the Commission was primarily attacking certain types of programs generally referred to as "telephone giveaway" programs which at various times and in various areas have achieved wide popularity. The language of the Order was ambiguous and broad enough to cover also a type of program commonly referred to as the "studio giveaway", but the Commission's staff took the position that this was not intended.

The distinguishing feature of the telephone giveaway program is the home participation of members of the broadcast audience in contests conducted with the assistance of the telephone. The contest participants are generally chosen in part by lot, there being no other practicable means of

¹ This report is annexed to the NBC amended complaint as Exhibit B; it can be found in Pike & Fischer, *Radio Regulation*, vol. 1, Pt. 3, page 91:231.

selection, and prizes are awarded for successful performances. The Commission has taken the position that all such programs are illegal lotteries. It bases its position upon the argument that a contestant by the very act of listening to the program is furnishing the "consideration" which has long been settled to be a necessary element of a lottery at the criminal law, and which in the classic lottery is the price of the lottery ticket.

The District Court upheld the right of the Commission to promulgate rules with respect to this subject matter and it held that programs of the giveaway type, but requiring contestants to contribute "any money or thing of value" were lotteries and did violate the statute.² It disagreed, however, with the Commission's position that programs imposing no such requirements are nevertheless lotteries and held that the specific paragraphs of the Order which would have the effect of defining all telephone giveaway programs as lotteries are an incorrect interpretation of the law.

This is the only portion of the final judgment entered below from which an appeal has been taken. The United States itself has not appealed, presumably being satisfied with the District Court's decision as to this point; the Commission accordingly is prosecuting the present appeal alone.

ARGUMENT

POINT I

The Decision of the District Court Is in Accord With the Overwhelming Weight of Authority

Section 1304 of the United States Criminal Code prohibits the broadcast of lottery information; other provisions pro-

² The majority and dissenting opinions of the District Court are reported *sub nom. American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953).

hibiting or penalizing lotteries have long been part of the law of the United States and of most States. A large body of case law has grown up as to the meaning of the word "lottery" and as to the elements which must be found in any scheme before the various anti-lottery statutes can be held to have been violated. This case law is unanimous on one point—that the three essential elements of a lottery are the elements of "prize", "chance", and "consideration". When any of these three elements is absent a contest is not to be considered a lottery. See, e.g., *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U.S. 675 (1916) (no consideration); *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914) (no chance).

Even the Commission in the Report which it issued in connection with the adoption of the Order paid lip service to this rule. The Commission said:

"the proposed rules all deal with situations which contain in *some manner* all of the three elements of prize, chance and *some form* of consideration, which had been held by the courts to be the essential features of lotteries * * * ." (Emphasis added) (Pike & Fischer, *Radio Regulation*, vol. 1, Pt. 3, p. 91:235-6)

The District Court considered however that in the specific paragraphs of its Order directed against the simple telephone giveaway the Commission had gone far beyond the true meaning of the element of consideration in this traditional definition. It was for this reason that it enjoined the enforcement of subparagraphs 2, 3 and 4 of paragraph (b) of the Order.

The evil which lottery statutes guard against is the evil of improvidence on the part of the public, especially persons of limited means, who might tend to squander their funds in a deluded hope of winning great prize. The element of consideration has therefore represented the precise element in

which lotteries have always seemed evil—the extracting from the contestant or would-be contestant of money or other things of genuine and considerable value. An excellent statement of this principle is made in Pickett, *Contests and the Lottery Laws*, 45 Harv.L.Rev. 1196, 1205 (1932):

“Ordinarily, a man possessed of his wits, who is not trying to defraud his creditors, may give away his property as he pleases. Whether the gift is by chance or method is immaterial so long as he alone can lose by the transaction. It is only when other people are induced to give up consideration in the hope of obtaining greater returns that the law becomes concerned. The theory behind the lottery laws is that people should be protected from dissipating their money by gambling against odds which usually are not fully appreciated. The element of consideration is therefore of vital legal significance.” (p. 1205)

By an accident of language “consideration” is also something traditionally requisite to making a promise enforceable and a contract valid. In our commercial society contract consideration is frequently found in mere technicalities.

In interpreting lottery statutes, however, to draw an analogy from technical contract consideration is to allow words to control sense to the detriment of genuine public policy. In general the courts have realized this and refused to be misled into adopting any definition of “consideration” for lottery purposes which would deprive the term of meaning and broaden the scope of the crime beyond the intent of the lawmakers.

One of the most recent cases on the point is discussed at some length in both the majority and the dissenting opinions in the District Court; it is *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E.D.N.Y. 1951), *stay refused per curiam on opinion below*, 192 F.2d 240 (2d Cir. 1951). The principle involved, however, was perhaps more

clearly stated by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Wall*, 295 Mass. 70, 3 N.E.2d 28 (1936):

“We agree with the defendant that the essence of a lottery is a chance for a prize for a price. [Citations] * * * One may give away his money by chance, and if the winner pays no price, there is no lottery. ‘Price’ in this connection means something of value and not the formal or technical consideration which would be sufficient to support a contract. [Citations]” (3 N.E.2d at 29-30).

The few contrary cases on which the Commission relies have been considered and rejected as authority in the best reasoned decisions. Thus, it is said in *State v. Big Chief Corp.*, 64 R.I. 448, 13 A.2d 236 (1940):

“It has been held in a few cases that the requirement of consideration is satisfied by any conduct which would constitute consideration for an executory contract. See, for instance, *Maughs v. Porter*, 157 Va. 415, 161 S.E. 242. But this holding is against the very great weight of authority and we do not follow it in the instant case.

“On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value.” (p. 239)

When it is considered that we are dealing with statutes defining a crime, the majority rule seems the only one which can be justified. Other cases applying it include:

Post Publishing Co. v. Murray, 230 Fed. 773 (1st Cir., 1916), *cert. denied*, 241 U.S. 675 (1916);

State v. Stern, 201 Minn. 139, 275 N.W. 626 (1937);

State v. Eames, 87 N.H. 477, 183 Atl. 590 (1936);

People v. Burns, 304 N.Y. 380, 107 N.E. 2d 498 (1952)

(See esp. statement of facts in 304 N.Y., not reprinted in 107 N.E. 2d);

People v. Shafer, 160 Misc. 174, 289 N.Y. Supp. 649 (Monroe Co. 1936, *aff'd mem.*, 273 N.Y. 475, 6 N.E. 2d 410 (1936)).

The District Court with respect to this aspect of the case made the following cogent comments:

"We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. * * *

"It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute *Griffith Amusement Co. v. Morgan*, Tex. Civ. App., 98 S.W. 2d 844. It is the value to the participant of what he gives that must be weighed. *People v. Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. *Commonwealth v. Wall*, 295 Mass. 70, 3 N.E. 2d 28; *State ex rel Stafford v. Fox Great Falls Theatre Corp.*, Mont., 132 P. 2d 689; *People v. Burns*, 304 N.Y. 380, 107 N.E. 2d 498. There are cases to the contrary, see footnotes in 54 C.J.S., Lotteries, § 2, on page 848, but this seems the more reasonable view." (110 F. Supp. at 386)

The District Court therefore properly rejected the Commission's argument, an argument which would in practice

prevent broadcasting from making any use of the well recognized "special appeal" to all audiences of programs involving actual audience participation in contests.

POINT II

The Intent of Congress Was That Section 1304 Should Be Construed in Accordance With the Existing Law

Section 1304 of the Criminal Code in effect extended to broadcasting the prohibition against dissemination of lottery information which had long been in effect under Federal statutes relating to the mails, and which now is codified as Sections 1301-3 of the Criminal Code. The last revision of the language of the postal lottery laws of any significance occurred in 1909, and that revision was minor. Compare L. Mar. 4, 1909, c. 321, §§ 213, 237, 35 Stat. 1129, 1136 with L. Mar. 2, 1895, c. 191, 28 Stat. 963, and with Rev. Stat. §§ 3894, 3929, 4041. In 1934, when the Communications Act was passed, incorporating as Section 316 the prohibition which now constitutes Section 1304 of the Criminal Code, there was a very long history of interpretation of the postal lottery statutes. This history had resulted in a well established interpretation of the words "lottery, gift enterprise, or similar scheme" as being limited to schemes in which participants were required to furnish a *valuable* consideration. It was clear as a matter of law that technical contract consideration was inadequate to meet this requirement. See: *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914); *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U.S. 675 (1916); *Peck v. United States*, 61 F. 2d 973 (5th Cir. 1932).

Thus if there was anything with which Congress was dealing when in 1934 it passed the statute here involved that was well established, it was the legal interpretation of

this particular language. Under the circumstances when Congress deliberately selected the same language for use in a new statute dealing with the broadcasting of lottery information, it clearly showed that the schemes the broadcasting of which it desired to prohibit were the same schemes which had been prohibited for generations—and for 25 years described by the same language—when carried on through the mails.

Under the circumstances it is submitted that the District Court was clearly correct when it said:

“The Federal lottery statute does not define a lottery. The term ‘lottery’ should be given its usual or popular meaning. Since it was part of the Federal Criminal Statute for so many years before the Federal Communications Act was adopted in 1934, the term ‘lottery’ should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code. *Brown v. Duchesne*, 19 How. 183, 60 U.S. 183, 15 L. Ed. 595; *Burnet v. Harmel*, 287 U.S. 103, 53 S. Ct. 74, 77 L. Ed. 199; *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 57 S. Ct. 452, 81 L. Ed. 685; *N.L.R.B. v. John W. Campbell, Inc.*, 5 Cir., 1947, 159 F. 2d 184. (110 F. Supp. at 382)

The kind of administrative enlargement of the scope of long-established criminal laws which the Commission has attempted to accomplish here was only recently condemned by the Supreme Court in *United States v. Halseth*, 342 U.S. 277, 280, 281 (1952). There the Post Office Department, administering Section 1301 of the Criminal Code, which prohibits interstate transportation of lottery materials in terms substantially identical with those contained in Section 1304, had several times requested Congress to amend the statute to cover punchboards. No such amend-

ment was ever adopted, but an attempt was made to prosecute the transportation of punchboards under the existing section. The Supreme Court, pointing out that a penal statute should be strictly construed, refused to interpret the statute as covering punchboards. If an addition to the law was to be made, the Court observed, “. . . it is for Congress to make the addition”. (Pa. 281)³

Conclusion and Prayer for Affirmance

As was pointed out by the District Court in its majority opinion:

“This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission’s membership. There are seven members of the Federal Communications Commission. The rules under attack were adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3) and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar ‘give-away’ programs, rendered by the Attorney General in 1940 although the Attorney General now appears in support of the Commission’s new rules.

“These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission’s opinion, although entitled to respect, is

³ The District Court in its opinion pointed out that a similar sequence of events had occurred in the present case. The Commission did not adopt the present Order until after it had failed over a period of nearly a decade to convince the Department of Justice and Congress that those agencies should act to prevent the broadcasting of “telephone giveaways”. (110 F. Supp. 379-380, 388)

not authoritative. *Interstate Commerce Comm. v. Service Trucking Co.*, 3 Cir., 186 F. 2d 400; *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 6 Cir., 190 F. 2d 326. We need not consider as applicable the admonition of Judge Frankfurter in *National Broadcasting Co. v. United States*, 319 U.S. 190 at page 218, 63 S. Ct. 997, 87 L. Ed. 1344, that the courts should hesitate to substitute their own views for those of the Commission in matters peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute, § 304, and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts." (110 F. Supp. 388-9)

The conclusion reached by the District Court is in accord with the overwhelming weight of authority on the technical point here involved. Moreover it gives to the words of the statute under consideration the meaning which those same words in similar statutes had acquired by authoritative interpretation at the time Congress was choosing them.

It is respectfully submitted that no substantial question of fact or law is raised by this appeal, and that the final judgment of the District Court should therefore be affirmed on the appeal papers.

Dated: May 22, 1953.

PAUL W. WILLIAMS,
Attorney for Plaintiff,
Office and Post Office Address:
 63 Wall Street,
 New York 5, New York.

Of Counsel:

THOMAS E. ERVIN,
 DUDLEY B. TENNEY.

(9083)

FILED

JAN 25 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 118.

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,
v.

NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR NATIONAL BROADCASTING
COMPANY, INC.**

✓
PAUL W. WILLIAMS,
*Attorney for National Broadcasting
Company, Inc.*

CAHILL, GORDON, ZACHRY & REINDEL,
THOMAS E. ERVIN,
DUDLEY B. TENNEY,
ROBERT KIRTLAND,
Of Counsel.

January 25, 1954.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
A. The Order	4
B. Programs Affected	5
C. The Decision Below.....	7
D. Earlier Attempts to Ban Giveaways.....	7
SUMMARY OF ARGUMENT.....	10
ARGUMENT:	
I.—The Commission's ban on giveaway programs goes beyond the farthest reach of any lottery case yet decided, and is based on an erroneous interpretation of the terms used in Section 1304 of the Criminal Code.....	12
A. The role of Price in Various Types of Lotteries	14
1. The Sweepstakes Lottery.....	15
2. The Gift Enterprise.....	16
3. Gift Enterprises with Opportunity for "Free" Chances	18
4. Schemes in Which Free Chances are Distributed in Such a Way as to Require Attendance at a Place of Business Where Sales May be Made, But Without Direct Tie-Ins Between the Chance and the Sale.....	21

	PAGE
B. The Commission's Treatment of Contrary Authorities	29
C. The Purpose of the Lottery Statutes.....	33
II.—The intent of Congress was that Section 1304 should be construed in accordance with the existing law	37
Statutory Derivation	37
Judicial Interpretation of the Postal Lottery Statutes	41
The Interpretation of the Postal Authorities.....	45
The Established Interpretation of the Lottery Laws Should Not be Enlarged Without Affirmative Congressional Action.....	47
III.—The Commission's Order in its original form exceeded its statutory authority.....	49
The Order is Contrary to Section 326 of the Communications Act	49
Section 1304 of the Criminal Code Forms No Basis for the Commission's Assertion of Jurisdiction	53
The Commission's Views in this Field are not Entitled to Special Respect.....	55
CONCLUSION	56
APPENDIX A—Statutes Involved	1a
APPENDIX B—Decisions on the Legality of Bank Night and Similar Schemes.....	5a

iii

TABLE OF CASES.

	PAGE
<i>Affiliated Enterprises v. Gantz</i> , 86 F. 2d 597 (10th Cir. 1936)	44, 6a
<i>Affiliated Enterprises, Inc. v. Gruber</i> , 86 F. 2d 958 (1st Cir. 1936).....	30, 44, 5a
<i>Affiliated Enterprises, Inc. v. Waller</i> , 1 Ter. 28, 5 A. 2d 257 (Del. Super. 1939).....	7a
<i>Albert Lea Amusement Corp. v. Hanson</i> , 231 Minn. 401, 43 N. W. 2d 249 (1950).....	20, 6a
<i>American Broadcasting Co. v. United States</i> , 110 F. Supp. 374 (S. D. N. Y. 1953).....	1
<i>Bader v. City of Cincinnati</i> , 21 Ohio L. R. 293 (C. P. 1923)	25
<i>Barker v. State</i> , 56 Ga. App. 705, 193 S. E. 605 (1937) ..	19, 7a
<i>Brice v. State</i> , 242 S. W. 2d 433 (Tex. Crim. App. 1951)	22
<i>Central States Theatre Corp. v. Patz</i> , 11 F. Supp. 566 (S. D. Iowa 1935).....	8a
<i>City of Wink v. Griffith Amusement Co.</i> , 129 Tex. 40, 100 S. W. 2d 695 (1936).....	5a, 7a
<i>Cole v. State</i> , 133 Tex. Cr. R. 548, 112 S. W. 2d 725 (Tex. Cr. App. 1938).....	7a
<i>Columbia Broadcasting System, Inc. v. United States</i> , 316 U. S. 407 (1942).....	53
<i>Commonwealth v. Heffner</i> , 304 Mass. 521, 24 N. E. 2d 508 (1939)	7a
<i>Commonwealth v. Lund</i> , 142 Pa. Super. 208, 15 A. 2d 839, <i>allocatur refused</i> , 142 Pa. Super. xxxi (Super. Ct. 1940).....	7a
<i>Commonwealth v. McLaughlin</i> , 307 Mass. 230, 29 N. E. 2d 821 (1940).....	7a
<i>Commonwealth v. Payne</i> , 307 Mass. 56, 29 N. E. 2d 709 (1940)	6a
<i>Commonwealth v. Wall</i> , 295 Mass. 70, 3 N. E. 2d 28 (1936)	12, 20, 5a
<i>Commercial Picture Corp. v. Regents of University of New York</i> , 22 U. S. Law Week 3193 (U. S. 1954) ..	53

	PAGE
<i>Cross v. People</i> , 18 Colo. 321, 32 Pac. 821 (1893).....	22
<i>Darlington Theatres v. Coker</i> , 190 S. C. 282, 2 S. E. 2d 782 (1939).....	20, 25, 26, 5a
<i>Dorman v. Publix-Saenger-Sparks Theatres, Inc.</i> , 135 Fla. 284, 184 So. 886 (1938).....	20, 5a
<i>Eastman v. Armstrong-Byrd Music Co.</i> , 212 Fed. 662 (8th Cir. 1914).....	13
<i>Furst v. A. & G. Amusement Co.</i> , 128 N. J. L. 311, 25 A. 2d 892 (Ct. Err. & App. 1942).....	8a
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769 (E. D. N. Y. 1951), <i>petition for stay</i> <i>dismissed on opinion of court below</i> , 192 F. 2d 240 (2d Cir. 1951).....	15, 21, 31, 44
<i>Griffith Amusement Co. v. Morgan</i> , 98 S. W. 2d 844 (Tex. Civ. App. 1936).....	26, 30, 5a
<i>Grimes v. State</i> , 235 Ala. 192, 178 So. 73 (1938).....	19, 24, 8a
<i>Horner v. United States</i> , 147 U. S. 449 (1893).....	17, 18, 25, 43
<i>Iris Amusement Corp. v. Kelly</i> , 366 Ill. 256, 8 N. E. 2d 648 (1937)	19, 7a
<i>Jorman v. State</i> , 54 Ga. App. 738, 188 S. E. 925 (1936)	7a
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U. S. 495 (1952)...	52
<i>Kessler v. Schreiber</i> , 39 F. Supp. 655 (S. D. N. Y. 1941)	19, 6a
<i>Knox Industries Corp. v. State ex rel. Scanland</i> , 258 P. 2d 910 (Okla. 1953).....	27, 30
<i>Little River Theatre Corp. v. State ex rel. Hodge</i> , 135 Fla. 854, 185 So. 855 (1939).....	7a
<i>Maughs v. Porter</i> , 157 Va. 415, 161 S. E. 242 (1931)	26, 27, 28
<i>McFadden v. Bain</i> , 162 Ore. 250, 91 P. 2d 292 (1939)	7a
<i>National Broadcasting Co. v. United States</i> , 319 U. S. 190 (1943)	49
<i>Near v. Minnesota</i> , 283 U. S. 697 (1931).....	50

	PAGE
<i>Peek v. United States</i> , 61 F. 2d 973 (5th Cir. 1932)....	37, 43
<i>People v. Burns</i> , 304 N. Y. 380, 107 N. E. 2d 498 (1952)	22, 30
<i>People v. Cardas</i> , 137 Cal. App. 788, 28 P. 2d 99 (1933)	30, 5a
<i>People v. Mail and Express Co.</i> , 179 N. Y. Supp. 640 (Spec. Sess. 1919), <i>aff'd mem.</i> , 231 N. Y. 586, 132 N. E. 898 (1921).....	25
<i>People v. Miller</i> , 271 N. Y. 44, 2 N. E. 2d 38 (1936)	6a
<i>People v. Shafer</i> , 160 Misc. 174, 289 N. Y. Supp. 649 (Monroe Co. 1936), <i>aff'd mem.</i> , 273 N. Y. 475, 6 N. E. 2d 410 (1936).....	30, 5a
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773 (1st Cir. 1916), <i>cert. denied</i> , 241 U. S. 675 (1916).....	13, 25, 37, 41, 43, 44
<i>Shanchell v. Lewis Amusement Corp.</i> , 171 So. 426 (La. Ct. App. 1936).....	6a
<i>Simmons v. Randforce Amusement Corp.</i> , 162 Misc. 491, 293 N. Y. S. 745 (Mun. Ct. 1936).....	5a
<i>Society Theater v. Seattle</i> , 118 Wash. 258, 203 Pac. 21 (1922)	18, 6a
<i>Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.</i> , 276 Mich. 127, 267 N. W. 602 (1936)	6a
<i>State ex rel. Beck v. Fox Kansas Theater Co.</i> , 144 Kan. 687, 62 P. 2d 929 (1936).....	8a
<i>State ex rel. Cowie v. La Crosse Theaters Co.</i> , 232 Wis. 153, 286 N. W. 707 (1939).....	6a
<i>State ex rel. Draper v. Lynch</i> , 192 Okla. 497, 137 P. 2d 949 (1943)	8a
<i>State ex rel. Dussault v. Fox Missoula Theatre Corp.</i> , 110 Mont. 441, 101 P. 2d 1065 (1940).....	8a
<i>State ex rel. Hunter v. Fox Beatrice Theatre Corp.</i> , 133 Neb. 392, 275 N. W. 605 (1937).....	7a
<i>State ex rel. Stafford v. Fox-Great Falls Theatre Corp.</i> , 114 Mont. 52, 132 P. 2d 689 (1942).....	5a, 8a
<i>State v. Bader</i> , 24 Ohio N. P. (N. S.) 186 (1922).....	25
<i>State v. Big Chief Corporation</i> , 64 R. I. 448, 13 A. 2d 236 (1940)	22, 23, 26, 30

	PAGE
<i>State v. Blumer</i> , 236 Wis. 129, 294 N. W. 491 (1940).....	26, 27
<i>State v. Crescent Amusement Co.</i> , 170 Tenn. 351, 95 S. W. 2d 310 (1936).....	5a
<i>State v. Danz</i> , 140 Wash. 546, 250 Pac. 37 (1926).....	17, 7a
<i>State v. Dorau</i> , 124 Conn. 160, 198 Atl. 573 (1938).....	8a
<i>State v. Eames</i> , 87 N. H. 477, 183 Atl. 590 (1936).....	5a
<i>State v. Greater Huntington Theatre Corp.</i> , 133 W. Va. 252, 55 S. E. 2d 681 (1949).....	19
<i>State v. Hundling</i> , 220 Iowa 1369, 264 N. W. 608 (1936)	5a
<i>State v. Jones</i> , 44 N. M. 623, 107 P. 2d 324 (1940).....	6a
<i>State v. McEwan</i> , 343 Mo. 213, 120 S. W. 2d 1098 (1938)	6a
<i>State v. Omaha Motion Picture Exhibitors Ass'n.</i> , 139 Neb. 312, 297 N. W. 547 (1941).....	7a
<i>State v. Robb & Rowley United</i> , 118 S. W. 2d 917 (Tex. Civ. App. 1938)	7a
<i>State v. Schubert Theatre Players Co.</i> , 203 Minn. 366, 281 N. W. 369 (1938)	6a
<i>State v. Stern</i> , 201 Minn. 139, 275 N. W. 626 (1937)....	7a
<i>State v. Wilson</i> , 109 Vt. 349, 196 Atl. 756 (1938).....	8a
<i>Stern v. Miner</i> , 239 Wis. 41, 300 N. W. 738 (1941)....	8a
<i>Stone v. Mississippi</i> , 101 U. S. 814 (1879).....	16
<i>St. Peter v. Pioneer Theatre Corp.</i> , 227 Iowa 1391, 291 N. W. 164 (1936).....	5a
<i>Superior Films, Inc. v. Department of Education of State of Ohio</i> , 21 U. S. Law Week 3193 (U. S. 1954)	52
<i>Toolson v. New York Yankees, Inc.</i> , 346 U. S. 356 (1953)	47, 48
<i>Troy Amusement Co. v. Attenweiler</i> , 64 Ohio App. 105, 28 N. E. 2d 207, <i>aff'd</i> , 137 Ohio St. 460, 30 N. E. 2d 799 (1940)	8a
<i>United-Detroit Theatres Corp. v. Colonial Theatrical Enterprise, Inc.</i> , 280 Mich. 425, 273 N. W. 756 (1937)	6a
<i>United States v. Halseth</i> , 342 U. S. 277 (1952).....	48
<i>United States v. Hughes</i> , 53 F. 2d 387 (S. D. Tex. 1931)	43

	PAGE
<i>United States v. Rich</i> , 90 F. Supp. 624 (E. D. Ill. 1950)	44
<i>United States v. Wiltberger</i> , 5 Wheat. 76 (U. S. 1820)	35
<i>Willis v. Young</i> [1907] 1 K. B. 448.....	19, 7a
<i>Yellow-Stone Kit v. State</i> , 88 Ala. 196, 7 So. 338 (1890)	24, 29, 32

STATUTES.

United States Criminal Code, Title 18 U. S. C.,	
§§ 1301-3	37
§ 1304	2, 3, 4, 9, 11, 12, 13, 29, 37, 53
§§ 1301-5	3
Title 28 U. S. C. §§ 1253 and 2101(b).....	2
Revised Statutes (1875) §§ 3894, 3929, 4041.....	38
L. July 12, 1876, § 2, 19 Stat. 90.....	39
L. Sept. 19, 1890, 26 Stat. 465.....	39
L. Mar. 2, 1895, 28 Stat. 963.....	40
L. Mar. 4, 1909, §§ 213, 214, 237, 35 Stat. 1129, 1130, 1136	40
Communications Act of 1934 as amended, 48 Stat. 1064 <i>et seq.</i> , 50 Stat. 189, 60 Stat. 1352, 63 Stat. 108, 47 U. S. C. §§ 151 <i>et seq.</i> :	
§ 4(i), 303(r), 307(a), 308(g), 309(a).....	3, 9
§ 326	3, 12, 49, 50, 51
Former § 316, repealed 62 Stat. 862 (1948).....	8, 9, 37

OTHER AUTHORITIES.

	PAGE
Davis Bill, H. R. 7716, 72d Cong., 1st Sess. (1932).....	41
H. R. Rep. No. 221, 72d Cong., 1st Sess. (1932).....	41
H. R. Rep. No. 2844, 51st Cong., 1st Sess. (1890) p. 4	39
Pike & Fischer, <i>Radio Regulation</i> , Vol. 1, Part 3, page 91:231	1
Sen. Rep. No. 564, 72d Cong., 1st Sess. (1932).....	41
Sen. Rep. No. 1677, 51st Cong., 1st Sess. (1890) p. 4	39
76 Cong. Rec. 3767-8	41
80 U. Pa. L. R. 744.....	26
18 Va. L. Rev. 465.....	26

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953.

No. 118.

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR NATIONAL BROADCASTING
COMPANY, INC.**

Opinions Below.

The majority and dissenting opinions (R. 110) of the District Court are reported *sub nom. American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S. D. N. Y. 1953). The Report and Order of the Federal Communications Commission here in issue have not been officially reported; they can be found in Pike & Fischer, *Radio Regulation*, Vol. 1, Part 3, page 91:231. They are attached to the NBC Amended Complaint as Exhibit B (R. 161).

Jurisdiction.

The final judgment of the Court below was entered on March 11, 1953. A petition for appeal therefrom was filed by the Federal Communications Commission on May 8, 1953, and the appeal was allowed on the same day. On October 12, 1953, this Court noted probable jurisdiction (R. 307). The jurisdiction of this Court on this appeal rests on Title 28 U. S. C. §§ 1253 and 2101(b).

Questions Presented.

The Order of the Federal Communications Commission here involved provides that all applications in connection with the operation of a broadcast station (including license renewal applications) will be denied if the applicant "proposes to follow or continue to follow" a practice of allowing the broadcast of certain defined types of programs. The intent and effect are admittedly to prohibit the broadcast of such programs.

The programs principally under attack are contest programs in which some of the contestants are drawn from the broadcast audience. Those in which the home contestants participate by telephone are frequently referred to as "telephone giveaways." The Commission has taken the view that these programs constitute violations of Section 1304 of the Criminal Code, Title 18 U. S. C., which prohibits the broadcast of lottery information. The Court below held that these particular programs were not in violation of the statute and enjoined enforcement of that portion of the Order (subdivisions (2), (3) and (4) of paragraph (b)) specifically designed to embrace them; it upheld the Order in all other respects, however, thus holding that the Commission has the authority to enforce Section 1304 by use of its licensing powers.

The first question presented therefore on this appeal by the Commission is:

Whether the radio and television contest programs here under attack constitute lotteries under Section 1304 of the United States Criminal Code.

The effect of the decision below was to hold all of the programs actually involved in the present actions to be legal, and therefore, neither NBC nor the other networks appealed from that portion of the decision below which upheld the right of the Commission to adopt rules of this character and which found that paragraphs (a) and (b)(1) of the Order were proper. The Commission takes the position in its brief that the questions determined in its favor below are no longer open (FCC Br. pp. 19-20). It is respectfully submitted, however, that the Commission's appeal necessarily presents those questions for decision. Obviously this Court cannot reverse the judgment appealed from for the purpose of enlarging the scope of the Order unless it agrees that the Order in its entirety is a proper exercise of the Commission's authority. The additional question presented by these appeals, so considered, is:

Whether the Commission has the power to decide that certain types of radio and television programs are illegal and forbid their broadcast.

Statutes Involved.

Sections 4(i), 303(r), 307(a), 308(b), 309(a) and 326 of the Communications Act of 1934, as amended (48 Stat. 1064 *et seq.*; 50 Stat. 189; 60 Stat. 1352; 63 Stat. 108; 47 U. S. C. §§ 151 *et seq.*); and Sections 1301-5 of the United States Criminal Code (Title 18 U. S. C. §§ 1301-5) are set forth in Appendix A hereto.

Statement.

A. The Order.

The Order involved in this appeal was adopted on August 18, 1949. Its enforcement has been suspended pending the final decision of this Court. Only four of the seven members of the Commission participated in the decision and one of the four dissented, so that the Order is actually the work of a minority of the Commission.

The text of the Order follows, with the portion underlined which was stricken by the Court below. The portion of paragraph (a) which is within the single quotation marks is the language of Section 1304 of the Criminal Code; paragraph (b) contains the Commission's interpretation of that language.

"Lotteries and Give-Away Programs—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See U. S. C. § 1304).

"(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any

person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

“(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

“(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

“(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

“(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.”

B. Programs Affected.

The Commission has made it clear in this proceeding that it is primarily attacking certain types of contest programs generally referred to as “telephone giveaway”

programs. The language of the Order was ambiguous and broad enough to cover also a type of contest program commonly referred to as "studio giveaways", but the Commission's staff has taken the position that this was not intended, and references to such programs in NBC's Amended Complaint have therefore been stricken (R. 118, 239).

The distinguishing feature of the telephone giveaway program is the home participation of members of the broadcast audience in contests conducted with the assistance of the telephone. The contest participants are generally chosen in part by lot, there being no other practicable means of selection, and prizes are awarded for successful performances.

The NBC Amended Complaint describes in paragraph 15 a typical television program coming within the terms of the Order (R. 151-2). A transcript of one broadcast of the program is Exhibit E to the NBC Amended Complaint (R. 198 *et seq.*).

This program, which is known as "What's My Name?", is a variation of a familiar parlor game in which famous persons are identified on the basis of clues supplied to the participants. In the broadcast version, all but one of the participants in the game are chosen from persons in attendance at the studio. Each person so chosen is given an opportunity to win a prize if he is successful in identifying a prominent personality from clues contained in a skit performed by the entertainers on the program.

The program also provides for the participation of one listener by means of long distance telephone. This listener is chosen at random from postcards sent in by listeners bearing their names and telephone numbers. If the person who is called answers the telephone he receives a watchband manufactured by the sponsor of the program and is also given the opportunity to win a "jackpot" prize by

identifying a person from clues given in the course of the program. The contest is held and all clues are given after the contestant is selected by telephone (so that he can even tune in the program after this selection) and after his identity is announced to the audience.

C. The Decision Below.

The three-judge District Court upheld the right of the Commission to promulgate rules with respect to this subject matter. It held, however, that the specific paragraphs of the Order which would have the practical effect of defining *all* telephone giveaway programs as lotteries are an incorrect interpretation of the law, and that their enforcement would be a form of censorship and a violation of the First Amendment. It therefore restricted the application of the rules to contest programs requiring contestants to contribute "any money or thing of value."

This is the portion of the final judgment entered below from which the Commission has appealed. Since their specific programs involved were upheld, no appeal was taken by the plaintiff networks. The United States itself, represented by the Department of Justice (the agency directly charged with the enforcement of the criminal laws), has not appealed; the Commission accordingly is prosecuting the present appeal alone.*

D. Earlier Attempts to Ban Giveaways.

Giveaway programs in one form or another have been broadcast for a good many years. The affidavit of G. B. Zorbaugh filed in support of ABC's motion for summary

* The failure of the Department of Justice to take an appeal on behalf of the United States gains importance from the emphasis placed by the dissenting judge below, Judge Clark, on the fact that the Department of Justice in the District Court was supporting the Commission's interpretation of the criminal statute (110 F. Supp. at 319).

judgment annexes a series of letters sent in 1940 by Mr. James L. Fly, then Chairman of the Commission, to the Attorney General of the United States (Exhibits E-1—J-2; R. 30-63). Mr. Fly specifically referred to former Section 316 of the Communications Act of 1934, which prior to the adoption of the United States Criminal Code contained the statutory provisions prohibiting the broadcast of lottery information. He suggested that criminal proceedings might be instituted against a number of stations because of their broadcasting giveaway programs.

The exhibits to the Zorbaugh affidavit also include with Chairman Fly's letters material forwarded to the Attorney General descriptive of the programs. A study of this descriptive material shows that these programs were in all respects similar to those against which the present Order is directed. For example, the program known as "Dixie Treasure Chest" (Ex. F1, R. 42-46) would plainly be in violation of subparagraphs (b) (2) and (b) (3) of the Order.

The Attorney General declined to take any action with respect to "Dixie Treasure Chest" or any of the other programs and so advised Mr. Fly by letter (R. 41-2, 46, 48-9, 52, 53).

In a letter dated December 30, 1943, Mr. Fly called the attention of the Chairman of the Interstate Commerce Committee of the United States Senate to the Commission's views concerning telephone giveaways. The letter requested an amendment to Section 316 of the Communications Act which would have retained the existing language as to lotteries, but would have added new language specifically prohibiting the broadcast of "any programs which offer money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance." Mr. Fly

explained that, in his view, these programs were "not good broadcasting", but that the present statute was inadequate to prohibit them. A copy of this letter is attached to the Zorbaugh affidavit as Exhibit D (R. 27-30). The proposed amendment to Section 316 was never adopted.

The next step taken by the Commission against give-away programs in general was the issuance of the original Notice of Proposed Rule-Making in this proceeding. In this Notice, the Commission cited Section 316 of the Communications Act as authority for its adoption of the proposed rules (R. 157). When it was called to the Commission's attention that Section 316 had been repealed prior to the Notice, its place being taken by Section 1304 of the Criminal Code, 18 U. S. C., the Commission issued a Supplemental Notice of Proposed Rule-Making (R. 159). In the Supplemental Notice the Commission states that its authority for issuing the proposed rules is to be found in Sections 4(i), 303(r), 307(a), 308(b) and 309(a) of the Communications Act of 1934 as amended. These sections contain the general rule-making and licensing powers of the Commission.

Paragraph 18 of the NBC Amended Complaint (R. 153), admitted to be correct by stipulation between the parties (R. 145), states that:

"18. The Commission did not have before it in the record on which it acted any evidence that these or any similar programs were contrary to or adversely affected the public interest, or that the broadcast licensees broadcasting such programs were of bad character or otherwise unfit to hold such licenses. The Commission made no finding that any of the programs coming within the terms of the Order was contrary to or adversely affected the public interest except in so far as they may violate Section 1304 of the United States Criminal Code."

After the promulgation of the Order, the present litigation followed. Its chronology is set forth in the Commission's brief at pages 5 and 6.

Summary of Argument.

I. An extensive body of law has developed as to the nature and elements of the lotteries prohibited in varying terms by statutes of the United States and every state. Regardless of the terms of the statutes the cases are agreed that the elements of a lottery are "prize", "chance" and "price" (or "consideration"). The overwhelming majority of the cases, moreover, stand squarely for the proposition that no contest is a lottery unless the price which it requires is, in substance if not in form, an actual payment of money or its equivalent by the contest participants; formal or technical "consideration" in the contract sense would not be sufficient. Contrary to this very great weight of authority, a few cases have held that to require participants to come to a place of business where sales of the promoter's merchandise are likely (but not required) to be made to the participants is a sufficient substitute. Not a single case, however, has ever found that the equivalent of a lottery price is paid by a contestant who is required only to give, in his own home, attention to a contest program. Not a single case has suggested that exposure of a contestant in his own home to advertising is the equivalent of buying the commodity advertised. The Commission's Order cannot be supported without taking this additional step beyond all the decided cases.

The Commission's suggestion that its ban on telephone giveaway programs should be upheld either because they involve an appeal to the "gambling spirit" or because they produce profits for the broadcasters and sponsors is

indefensible in theory and not justified by the actual scope of the criminal statute which the Commission claims to be interpreting. The Commission is actually attempting to impose upon the broadcasting industry its own views of what is "good broadcasting"; views which it has urged unsuccessfully in the past, both as grounds for criminal prosecution and as grounds for amending the criminal statutes. If the Commission's Order is upheld in its entirety a whole class of programs—all those programs involving audience participation in contests—will be arbitrarily and unjustifiably banned.

II. The language of definition in Section 1304 of the Criminal Code which the Commission's Order purports to interpret was adopted verbatim by Congress in 1934 from the postal lottery statutes. In the postal lottery statutes that language had been unchanged since 1909 and before that had existed in substantially the same form since 1890. A well-established judicial interpretation had been placed on the postal lottery statutes as prohibiting only schemes which were designed to make participants pay a valuable consideration. It seems clear that Congress intended the identical language to be identically interpreted in the field of broadcasting. Both the consistent administrative interpretation by the Post Office Department of this language and the failure of Congress on request to amend it support the established judicial interpretation. It would be improper to change that interpretation without affirmative legislative action.

III. The Commission's present appeal, by asking that the scope of its Order as approved below should be enlarged, necessarily presents to this Court all those arguments properly urged against the Order below. The principal

questions relate to the interpretation of Section 326 of the Communications Act and to the Commission's power to act on the basis of unadjudicated violations of the criminal law.

It is submitted that Section 326 of the Communications Act in accordance with its plain terms should be interpreted as forbidding the use by the Commission of its general licensing powers to accomplish the results of censorship, even if the censorship attempted would be constitutional since in aid of a valid criminal statute. For the Commission to prohibit broadcasts not otherwise prohibited under the lottery broadcasting laws would moreover violate the First Amendment. The congressional mandate to prevent lottery broadcasts should be construed as deliberately withheld from the Commission and directed solely to the Department of Justice. In the absence of any authority from Congress to act in this field, the Commission cannot rely on unadjudicated violations of criminal statutes as providing the basis for an exercise of its general powers.

ARGUMENT.

I.

The Commission's ban on giveaway programs goes beyond the farthest reach of any lottery case yet decided, and is based on an erroneous interpretation of the terms used in Section 1304 of the Criminal Code.

No clearer statement of the nature of a lottery has been made than the definition by Judge Qua in *Commonwealth v. Wall*, 295 Mass. 70, 72, 3 N. E. 2d 28, 29-30 (1936):

"We agree with the defendant that the essence of a lottery is a chance for a prize for a price. [Citations omitted] * * * One may give away his money by chance, and if the winner pays no price, there is no lottery. 'Price' in this connection means something

of value and not the formal or technical consideration which would be sufficient to support a contract. [Citations omitted]."

Section 1304 of the United States Criminal Code prohibits the broadcast of lottery information; other provisions prohibiting or penalizing lotteries have long been part of the law of the United States and of most of the states. The state statutes against lotteries vary somewhat in their language but this fact has not prevented the development of a body of case law of an almost common-law quality.

The Commission's brief conveys an accurate impression of the size of this body of case law. It fails, however, to disclose that not a single case in this great mass actually holds that any lottery statute can be violated (as the Commission argues) when participants or contestants are asked to do nothing more than give their attention to a broadcast as the price for their chance to win a prize.

In fact, this case law is substantially unanimous that the three essentials of a lottery (regardless of the language of the statutes being enforced) are "prize", "chance", and "price" (or "consideration"). When any of these three elements is absent, a contest is not to be considered a lottery. See, *e.g.*, *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916) (no consideration); *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir. 1914) (no chance).

Even the Commission in the Report which it issued in connection with the adoption of the Order paid lip service to this rule. The Commission said:

"* * * the proposed rules all deal with situations which contain in *some manner* all of the three elements of prize, chance and *some form* of consideration, which had been held by the courts to be

the essential features of lotteries * * *." (Emphasis added) (R. 167)

The element here in issue is the element of "price", or "consideration." It is, under all the cases, a necessary element of a lottery, just as at common law delivery is a necessary part of a gift. When a money payment or its equivalent is required of each participant, consideration is present in the lottery sense. The cases are not in full agreement as to the extent to which it can be supplied by anything less. Some find that payment of money by one group of the contestants, while another group pays nothing, satisfies the requirement. A very few cases find that visits to the promoter's store, with the accompanying chance for the promoter to attempt a sale, satisfies the requirement. Not a single case has ever found that a lottery price is paid by a contestant being required to give, in his own home, attention to a contest program. Not a single case has suggested that exposure of a contestant in his own home to advertising could be considered the equivalent of buying the commodity advertised.

A. The Role of Price in Various Types of Lotteries.

The Commission cites 130 cases in its brief. By treating every decision that a lottery existed as if it were an authority that a lottery exists on the very different facts present here, and by taking language stimulated by particular situations as if it were applicable to all situations, the Commission seeks to create the illusion of a considerable body of authority in its favor. In reality, however, the overwhelming weight of authority is squarely in support of the decision below. Not a single federal decision conflicts with it and the only two dissents from the point of view which it embodies that have ever been voiced by a federal judge were both by Judge Clark (in the instant case,

and in *Garden City Chamber of Commerce v. Wagner*, 192 F. 2d 240 (2d Cir. 1951)). In both cases Judge Clark was unable to persuade his colleagues, Judges A. N. Hand and Chase in the *Garden City* case, and Judges Leibell and Weinfeld in the instant case.

The prohibition of Congress against any "lottery, gift enterprise or similar scheme" is limited by the legal meaning of the terms used. The effect of the case law is that this meaning includes only situations in which the participants are required to give a valuable consideration. The first lesson of the cases is that they have dealt with the concept of lottery consideration in at least four differing states of fact, and their holdings and dicta must be read in the light of their different facts.

The four situations, briefly, are:

1. The "sweepstakes" lottery.
2. The "gift enterprise"—in which a chance is "given" to each purchaser of a commodity.
3. The "gift enterprise" in which some (not all) of the chances are given to persons not purchasing anything.
4. The scheme in which free chances are distributed in such a way as to require attendance at a place of business where sales may be made, but without direct tie-ins between the chance and the sale.

These situations (none of which would include the instant case) must be discussed in more detail, with particular attention to the cases in the last two classifications.

1. The Sweepstakes Lottery.

"Sweepstakes" and "raffles" and similar enterprises, in which tickets are sold and prizes are awarded among the ticketholders by lot, are of course well known.

As to them, there has never been any conflict of opinion or authority; such enterprises are lotteries. The cases involving them (such as *Stone v. Mississippi*, 101 U. S. 814 (1879), FCC Br. p. 36) have dealt only with the question of whether they can properly be prohibited. Such cases, whatever the strength of their language as to the evil of lotteries, are no authority one way or the other as to whether the contest programs here involved are lotteries.

It was this type of lottery that was dealt with by the "Select Committee of 1808" and by the Royal Commission Report of 1933, from which the Commission's brief draws the inference that these British legislative bodies would condemn radio and television contest programs (FCC Br. pp. 31-2). The legislative history of lottery prohibitions in this country cited in the Commission's brief also is concerned with this kind of lottery. It is not surprising that the pernicious effects of the "gambling spirit" are so often and strongly denounced. It is only surprising that the Commission is suggesting that such denunciations are equally applicable to radio and television contest programs.

2. The Gift Enterprise.

"Gift enterprise" was a term early applied to a scheme in which the chance was delivered "free" as a concomitant of merchandise purchased by the contestant. The promoters of such schemes argued that since the merchandise was "worth" the entire sum paid, the chance must be considered to be free.

If value is conceived of as a fixed quantity, this argument seems plausible. Recognition that value is relative, however, and that (in accordance with ordinary accounting principles) a part of the price paid is necessarily allocable to the chance, solves this difficulty, by showing

that the "gift enterprise" is simply a form of the "sweepstakes" lottery. The courts are in general agreement that the sale of merchandise to which is attached the "free" chance for a prize is illegal. Nor is any substantial change in the gift enterprise accomplished by having the promoter distribute a few free chances to persons selected by himself, and such devices have been held to be lotteries. See *State v. Danz*, 140 Wash. 546, 548, 250 Pac. 37, 38 (1926) where the court put the case:

"If in the flourishing days of the Louisiana lottery its management had advertised that it would give a free ticket to the president of every bank in the city of New Orleans, that would not have changed the scheme from a lottery, whether or not any one or all of such free tickets were accepted."

One of the cases of the "gift enterprise" type is *Horner v. United States*, 147 U. S. 449 (1893). There the Supreme Court held that certain bonds of the Austrian Government involved lotteries, and as such could not use the mails. The bonds were to be redeemed in a manner determined by lot, the element of chance to determine both the redemption price and the time of payment. A few of the bonds were to be redeemed soon after issuance at very high premiums, while the rest of the bonds would be paid off only at their principal amount plus "a very small rate of interest upon that principal" (147 U. S. at 461), and some of the bondholders would not get their money back until the end of fifty-five years.

The defendant argued that the bonds could not constitute a lottery since all of the bonds would eventually be paid off with interest. The Court rejected this argument, perceiving clearly that, "Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an 'enterprise offering prizes depend-

ent upon lot or chance.' The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter" (147 U. S. at 459). Thus the Court recognized that this was a situation where the bondholder actually "purchased" his chance. He paid part of his money for the feature of the bond that depended upon chance, just as he paid part for the feature that was certain. The court referred to the "appeal to the cupidity of those who had money" (147 U. S. at 459; FCC Br. p. 38), but such a case obviously is no more an authority that broadcast contest programs are lotteries than it is an authority that all "appeals to cupidity" are crimes. Indeed, the reasoning of the *Horner* case fully supports the decision of the court below that the crucial test of a lottery is whether a price is paid for the chance.

The "gift enterprise" type of lottery has not been confined to situations where chances were given together with merchandise purchased by participants, but has extended also to theatre promotional schemes involving chances given to the ticket buyers, which are equally illegal. *E. g.*, *Society Theater v. Seattle*, 118 Wash. 258, 203 Pac. 21 (1922); see also Appendix B.

3. Gift Enterprises with Opportunity for "Free" Chances.

The next stage of the analysis concerns situations in which a variation was introduced into the "gift enterprise" scheme by adding to the opportunity for obtaining a chance without any payment whatever. Of these cases the great bulk have concerned theatre promotional schemes, the most familiar being called "Bank Night." A tabulation of such cases classified according to the analyses offered by the courts is annexed to this brief as Appendix B.

The "free-play" Bank Night scheme allowed persons to qualify for a prize by entering their names on a register

in the lobby of a theatre and by standing outside while the drawing was in progress. One could also qualify by buying an admission ticket. The winning numbers were announced from the stage and at the entrance to the theatre.

Some decisions as to Bank Night held that the free-play device was merely a subterfuge. *E. g.*, *Kessler v. Schreiber*, 39 F. Supp. 655 (S. D. N. Y. 1941). Other courts reasoned that the paying patrons of the theatre clearly paid in part for the chance. *E. g.*, *State v. Greater Huntington Theatre Corp.*, 133 W. Va. 252, 55 S. E. 2d 681 (1949). In other cases the participants were viewed collectively as a group and held to have paid a price for their chance. *E. g.*, *Barker v. State*, 56 Ga. App. 705, 193 S. E. 605 (1937); *Willis v. Young*, [1907] 1 K. B. 448, a newspaper promotion case, adopted this theory (contrary to the implication of the discussion in the Commission's brief at page 53). Still other courts found that consideration was supplied by those theatre patrons who would not have bought tickets but for the existence of the chance, and evidence that there were such was found in the increased gate receipts on Bank Night. *E. g.*, *Grimes v. State*, 235 Ala. 192, 178 So. 73 (1938). All such approaches, of course, lead to condemning the enterprise. It is important to note that the implication of each approach is that without the payment of valuable consideration by some or all of the participants there would be no lottery. These decisions are therefore fundamentally inconsistent with the position taken here by the FCC.

Many courts have in the course of their opinions inveighed against the evils of lotteries.* A few have used

* The absurdity of relying on such dicta as if they defined the scope of the statute is illustrated in *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 267-8, 8 N. E. 2d 648, 653 (1937), where the court listed among those evils not only cupidity, envy, jealousy and temptation, but also the obstruction of traffic in the streets.

language of contract law speaking of benefits to the promoter and "legal detriment" to persons standing in the street as constituting legal consideration, not mentioning that analysis of the facts would actually disclose valuable consideration to be present.

All of these cases deal with a situation in which by any conceivable test a far more tangible price is paid for the chance than in the broadcast contest programs which the Commission wishes to ban. The real controversy is over the effect of the fact that a few contestants did not pay, although most did. Obviously cases holding such enterprises to be lotteries are no authority whatsoever in support of the Commission's argument here, as to programs in which no contestant pays, and it would be a mistake to apply their language indiscriminately to facts much different from those before the courts.

On the other hand, the very substantial number of cases which have held Bank Night and similar enterprises to be legal are strong and direct authority against the Commission. See, *e. g.*, *Albert Lea Amusement Corp. v. Hanson*, 231 Minn. 401, 43 N. W. 2d 249 (1950); *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782 (1939); *Dorman v. Publix-Saenger-Sparks Theatres, Inc.*, 135 Fla. 284, 184 So. 886 (1938). To the courts which reached these decisions, the instant case would obviously present an *a fortiori* situation.

Commonwealth v. Wall, 295 Mass. 70, 3 N. E. 2d 28 (1936), points out that the test is a purely factual one as to whether the chance is genuinely "free" or sold for a price and logically treats it as a jury question. Whichever way courts decide this factual question, the necessity to decide it demonstrates an agreement of principle that the

scheme is not a lottery unless a valuable consideration is present.

4. Schemes in which Free Chances are Distributed in Such a Way as to Require Attendance at a Place of Business where Sales may be Made, but without Direct Tie-Ins between the Chance and the Sale.

The next and last group of cases involves business promotional campaigns which bring participants to the sales place of the promoter but do not require purchases by them. The better and far more numerous authorities hold the campaigns not to be lotteries.

Garden City Chamber of Commerce v. Wagner, 100 F. Supp. 769 (E. D. N. Y. 1951), *petition for stay dismissed on opinion of court below*, 192 F. 2d 240 (2d Cir. 1951), was such a case. There the merchants of Garden City mailed numbered postcards. The recipient of a card might claim a prize by window-shopping at the various stores of the participating merchants and discovering an article of merchandise in the window bearing a number corresponding to the number of his card. The Postmaster banned the postcards from the mails on the ground that the scheme constituted a lottery in violation of the postal lottery statutes, the language of which parallels the statute in issue in the instant case. On suit being brought by the Garden City Chamber of Commerce, the United States District Court held that the scheme was not a lottery, and that the postcards must be accepted as mailable, since the element of consideration was lacking. The case came before the Court of Appeals on motion of the Government for a stay. The court denied the motion for the reasons stated in the opinion below. Thereafter, the Government dropped its appeal, which is not surprising in view of the fact that both the majority memorandum and

the dissenting opinion indicate that the decision on the motion had been made on the basis of a determination that the appeal was without merit.

In *People v. Burns*, 304 N. Y. 380, 107 N. E. 2d 499 (1952)*, the defendant conducted a vaudeville show for which an admission fee was charged. At the conclusion of the show the doors were opened, additional persons were admitted free of charge, and "Bingo" was played. The persons entering free participated in the distribution of prizes. The New York Court of Appeals held that the scheme was not a lottery in that proof was lacking that participants in the game were "persons who have paid * * * consideration for the chance" (304 N. Y. at p. 382).

In *Brice v. State*, 242 S. W. 2d 433 (Tex. Crim. App. 1951), a merchant gave away prizes at the opening of his store. Anyone could become eligible for the drawing by going to the store and signing the registration book there. There was no requirement that the registrant buy anything. The court held that consideration was lacking.

In *Cross v. People*, 18 Colo. 321, 32 Pac. 821 (1893), the defendants gave away pianos to advertise their shoe store. Chances were given free to all who registered at the store, and also to those who sent in a written request together with a stamp. Information regarding the free pianos was published in the newspaper as a part of an advertisement of defendants' shoes. The court held the program not a lottery, stating that the adjudicated cases made the payment of a valuable consideration for the chance an essential element of a lottery and that the benefits to the merchant were too remote to meet that requirement.

In *State v. Big Chief Corporation*, 64 R. I. 448, 13 A. 2d 236 (1940), cash prizes were awarded by a grocery mar-

* The statement of facts appears only in the official report.

ket to persons who became participants by registering and obtaining free tickets at the market. Participants were not required to buy any groceries in order to be eligible, but they were required to go to the market within the preceding five days and have their registered card marked accordingly. The court recognized that the program had had the effect of increasing the attendance at the market but held that consideration having a pecuniary value was an essential element of a lottery:

"It has been held in a few cases that the requirement of consideration is satisfied by any conduct which would constitute consideration for an executory contract. See, for instance, *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242. But this holding is against the very great weight of authority and we do not follow it in the instant case.

"On the contrary, we accept and apply the doctrine that the consideration, required as one of the necessary elements of a lottery within the meaning of that term as used in statutes forbidding lotteries, must be a consideration having a pecuniary value. *Commonwealth v. Wall*, 1936, Mass., 3 N. E. 2d 28" (64 R. I. at 454, 13 A. 2d at 239).

The court observed that there was no evidence that people had paid money for the chance as well as merchandise, nor even that persons had bought merchandise from the defendant because they came to the market in order to participate in the drawings. The court made clear that it did not decide whether such evidence would have constituted a lottery, but, on the stipulated facts it was plain that the lottery laws had not been violated. The FCC attempts to distinguish the *Big Chief* case as inapplicable because of the lack of evidence of monetary contribution by the participants to the promoter, but surely that is the very

fact which is so conspicuously absent in the broadcast contest programs.

A leading case of this group is *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890), which has been so often cited that the Commission criticizes most similar cases as being "inbred" with it (FCC Br. p. 55; see pp. 31-32 *infra*). The court held that a traveling medicine man was not conducting a lottery merely because he awarded free prizes to those attending his show. No charge was made for entrance into the tent, and tickets for the drawing were distributed free, but a fee was charged for a seat. During the course of the show, Kit sold patent medicines. Both the Alabama Constitution and statutes forbade lotteries.

The court rested its decision that the law was not violated on the ground that no consideration was paid directly or indirectly for the chance of participating in the distribution. In its view, neither the decided cases nor the policy of the statutes would justify considering Yellow-Stone Kit's conduct as criminal.

"It may be safely asserted, as the result of the adjudged cases, that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize. [citing cases] * * *" (88 Ala. at 199, 7 So. at 338).

The lottery law as interpreted by *Yellow-Stone Kit v. State* continued to be the law of Alabama even after several statutory revisions and was expressly approved by *Grimes v. State*, 235 Ala. 192, 178 So. 73 (1938), which the Commission cites as if it represented a change in the Alabama law (FCC Br. pp. 59-60).

Other cases have reached the same result on analogous states of facts. See, *e. g.*, *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916) (discussed in detail in Point II below); *People v. Mail and Express Co.*, 179 N. Y. Supp. 640 (Spec. Sess. 1919), *aff'd mem.*, 231 N. Y. 586, 132 N. E. 898 (1921).

Three cases have held promotional schemes falling within this same general class to be lotteries, and they are relied on by the Commission.* These decisions are in conflict with the great weight of authority. They are, of course, directly contrary to the decisions just discussed. They also are directly contrary to all of the decisions holding legal theatre Bank Nights with free-play features, *e. g.*, *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782 (1939). Perhaps most important, they are basically inconsistent with the reasoning of all of the cases in which the decision that a given scheme was a lottery has turned upon a finding that something of value was actually given by the participants for their chance. This includes both "gift enterprise" cases, such as *Horner v. United States*, 147 U. S. 449 (1893), and that majority of the Bank Night cases which has expressed in words its recognition that something of value has actually been extracted from the Bank Night audience by the promoter in consideration of the

* In a footnote the Commission cites three additional cases (FCC Br. p. 52n). Two are, as the Commission's own statement shows, cases in which participants (or someone on their behalf) either paid for lottery tickets or bought merchandise. As to the third, *Bader v. City of Cincinnati*, 21 Ohio L. R. 293 (C. P. 1923), affirming *State v. Bader*, 24 Ohio N. P. (N. S.) 186 (1922), the erroneous statement is made that a cafeteria gave chances free to patrons and non-patrons alike. According to the opinion, "the overwhelming majority" of the tickets were presented to patrons when they paid for their meals and, according to the defendant, "some" of the tickets were distributed to persons other than patrons and at places other than the restaurant. Nothing in the opinion supports the inference that tickets would be given free to any non-patron who made the request. The case was clearly in the "gift enterprise" class.

chance which he has given it to win a prize. The importance of the Commission's three cases in determining the accepted meaning of the word "lottery" must be judged against this background of overwhelming disagreement.

The earliest of the three decisions was *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242 (1931). Mrs. Maughs, one of those who had been lured to attend an auction on the promise that a new Ford would be given away by lot among those attending, regardless of whether or not they paid, had won the raffle and was suing Porter, the auctioneer, to compel him to deliver the Ford to her. Porter's defense apparently was that either his promise lacked consideration and therefore was not a contract, or that, if consideration was present, the scheme was a lottery and illegal. The court found that Mrs. Maughs' attendance at the auction pursuant to the conditions expressed in Porter's advertisement constituted consideration both for Porter's promise and for a lottery, and that the promise was therefore a contract unenforceable for illegality. The *Maughs* case has been severely criticized by legal writers and by courts. *E.g.*, 80 U. Pa. L. R. 744, 18 Va. L. Rev. 465; *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782 (1939); *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844, 847 (Tex. Civ. App. 1936); *State v. Big Chief Corp.*, 64 R. I. 448, 454, 13 A. 2d 236, 239 (1940). It was considered and rejected as unsound by the majority of the District Court in the present case.

The second case holding illegal a similar business promotional scheme was *State v. Blumer*, 236 Wis. 129, 294 N. W. 491 (1940). There a drugstore operator ran daily pools with a prize of \$1. In order to be eligible for the prize a participant must have gone to the drugstore on the day preceding the drawing and there requested and obtained a daily coupon, for which no charge was made.

In the third case holding a similar promotional scheme to be a lottery, tickets might be obtained free upon request from service station attendants. *Knox Industries Corp. v. State ex. rel. Scanland*, 258 P. 2d 910 (Okla. 1953). The winning number was posted at the service stations.

While the *Maughs*, *Blumer* and *Knox* cases are the outer limits of what courts have held to be lotteries (and are contrary to the weight of authority), they fall far short of the facts of the instant case. In the *Maughs* case, Mrs. Maughs was required by the auctioneer to pay him a \$5 fee for his services in drawing the winning number. In the *Knox* case the participant who held the winning number might be required to travel to another city to claim the prize. It takes little imagination to recognize the likelihood of pressure to buy something from the druggist who distributed the free coupons in the *Blumer* case, and to buy gasoline at the service stations in the *Knox* case. In all three cases the participants were required to leave their homes and travel to the promoter's place of business, the considerable inconvenience of which was emphasized by the courts.

No similar requirement or indirect coercion is to be found in "What's My Name?" or any other standard telephone giveaway program. The listener participates from his own home. He does not have to go to the promoter's store. He is not required to ask sales personnel for free chances.

The prospect of winning a prize on such programs does not induce anybody to buy anything. At most it induces persons to listen to the program, an act which costs the listener nothing. If, because of listening to the commercials on the program, a person thereafter buys the sponsor's product, it is not the prospect of winning—the "bait"—which has stimulated the purchase. The contest is

over by that time, and it is perfectly clear to any prospective purchaser that his chances of winning a prize have absolutely no relation to whether he buys or ignores the sponsor's product.

The obvious fact is that the programs which the Commission desires to prohibit do not in the least meet the tests considered significant in the cases on which the Government relies. Without exception, those cases have involved situations where the participant in the scheme was either required to make an actual purchase or to take steps which brought him up to the point of sale,—the lobby of a theatre in the "Bank Night" cases, or the place of an auction in *Maughs v. Porter*. That cannot be said of the programs now under the Commission's attack.

The District Court with respect to this aspect of the case made the following cogent comments:

"We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. * * *

"It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. *Griffith Amusement Co. v. Morgan*, Tex. Civ. App. 98 S. W. 2d 844. It is the value to the participant of what he gives that must be weighed. *People v. Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute,

is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. *Commonwealth v. Wall*, 295 Mass. 70, 3 N. E. 2d 28; *State ex rel. Stafford v. Fox Great Falls Theatre Corp.*, Mont., 132 P. 2d 689; *People v. Burns*, 304 N. Y. 380, 107 N. E. 2d 498. There are cases to the contrary, see footnotes in 54 C. J. S., Lotteries, §2, on page 848, but this seems the more reasonable view" (110 F. Supp. at 386).

B. The Commission's Treatment of Contrary Authorities.

Faced with the almost unanimous consensus of the courts that a *valuable* consideration—"any money or thing of value", as it is termed in paragraph (b)(1) of the Order—is an element necessary to an illegal lottery, the Commission has sought to dispose of these adverse decisions by two devices: first, by discarding all decisions under statutes which refer in terms to a valuable consideration, since Section 1304 does not; and, second, by derogating all other adverse decisions on the grounds that they "uncritically" cite cases under differing statutes and that they are "tightly inbred" with an Alabama case decided in 1890, *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890), on which the Commission prefers to concentrate its fire. Both of these distinctions are without substance.

The difference in language of the statutes is unimportant because the decisions have turned, not on the language of the statutes, but on the courts' conceptions of the meaning to be attributed to the term "lottery" and similar terms, which the statutes have used to denominate the activities declared to be criminal. "*Valuable consideration*" has been considered an essential element of a lottery, not a separate requirement added by the terms of certain

statutes, and the cases are explicable only upon this understanding. Thus, with few exceptions the courts have treated statutes referring expressly to a valuable consideration as adding nothing to the common law as to what a lottery is, and they have treated cases under either type of statute as equally authoritative. Compare, out of many examples, *People v. Shafer*, 160 Misc. 174, 289 N. Y. Supp. 649 (Monroe Co. 1936), *aff'd mem.*, 273 N. Y. 475, 6 N. E. 2d 410 (1936); and *People v. Cardas*, 137 Cal. App. 788, 28 P. 2d 99 (1933), which were under statutes expressly referring to a "valuable" consideration, and each of which cited cases under statutes not so phrased as authoritative, with *Affiliated Enterprises, Inc. v. Gruber*, 86 F. 2d 958 (1st Cir. 1936); *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Tex. Civ. App. 1936), and *State v. Big Chief Corp.*, 64 R. I. 448, 13 A. 2d 236 (1940), each of which, under statutes not so phrased, relied on cases under statutes containing the words "valuable consideration" as authoritative.

In *People v. Burns*, 304 N. Y. 380, 107 N. E. 2d 498 (1952), the statute, set forth verbatim in the statement of the case preceding the opinion in the official report, uses the phrase "valuable consideration." The New York Court of Appeals, however, in its *per curiam* opinion, stated that there was no lottery since proof was lacking that the participants in the game "were 'persons who have paid * * * consideration for the chance'" (asterisks in original), deliberately omitting from its quotation of the statutory language the word "valuable" before the word "consideration." Even *Knox Industries Corp. v. State ex rel. Scanland*, 258 P. 2d 910 (Okla. 1953), so heavily relied on by the

Commission to demonstrate that consideration need *not* be valuable is under a statute requiring valuable consideration, yet disregards this language, citing cases under both types of statutes with no suggestion that the difference in language might justify a different treatment.

In most of the decisions applicable statutes are actually quoted, so that no court reviewing the authorities could fail to discern that there are differences in the statutes. The suggestion by the Commission (FCC Br. p. 59) that the state courts which decided these cases were so "uncritical" that they did not recognize the difference in the statutes is impertinent. The courts were deciding the elements of the "lottery" which each statute prohibited as a crime; that they cited cases under different statutes demonstrates that they considered statutes which set out in detail elements such as "valuable consideration" to be declaratory of the effect of the statutes which simply prohibit lotteries as such. Plainly both the holdings of the cases and the views of the courts which decided them are against the Commission's position.

The Commission's method of dealing with the rest of the large number of cases directly contrary to its position is particularly interesting (See FCC Br. pp. 54-60).

Garden City Chamber of Commerce v. Wagner, 100 F. Supp. 769 (E. D. N. Y. 1951), *petition for stay dismissed on opinion of court below*, 192 F. 2d 240 (1951), (*supra*, pp. 21-22), is stigmatized as the only federal decision relied on by the District Court—although *no* federal decisions have ever supported the Commission's views on this point, and, as the Commission is aware, several have taken the opposite view.

As to other contrary authorities, the Supreme Judicial Court of Massachusetts might be dismayed to learn that its decisions, like the decisions of Texas, South Carolina,

New Hampshire, Colorado, Iowa, the Northern District of Illinois, Minnesota, and the First Circuit Court of Appeals, are all "tightly inbred" with an earlier Alabama decision.* Surely it is a new doctrine that for one court to cite another is a sign of "inbreeding". The Commission, however, is willing to make the same accusation against all cases which have even cited other cases which have in their turn cited the Alabama case.

Like the distinction of statutory language, this accusation of "tight inbreeding" fails to meet the crucial fact that, on the law, all of the courts of which the Commission disapproves hold that there is no lottery, gift enterprise or similar scheme unless a valuable consideration is required of the participants; that under those circumstances the use of these terms known to the law in a criminal statute should lead to their interpretation in accordance with the weight of authority as to their meaning; and that the Commission in purporting to interpret a statute has no standing to choose a deviant interpretation which it likes better unless it has reasonable grounds to believe that such was the meaning of Congress.

* The Commission says in its brief (pp. 55-6) that this decision, *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890), (discussed *supra*, p. 24) was the first to require a valuable consideration. This is completely misleading, since it implies that earlier cases did not. In fact, the earlier cases had made the requirement of valuable consideration so plain from their treatment of the lottery problem as a whole, that the necessity for expressly ruling on this point was never presented. *Yellow-Stone Kit* itself makes this clear. The sentence partially (and misleadingly) quoted in the Commission's brief at page 57 goes on to say:

"* * * we find no decision in which the element of a valuable consideration parted with, directly or indirectly, by the purchaser of a chance, does not enter into the transaction [citing many cases]." (88 Ala. at 200, 7 So. at 339).

C. The Purpose of the Lottery Statutes.

The main thrust of the Commission's argument is that the anti-lottery statutes are intended to improve the moral fibre of the American people by preventing them from submitting to their "cupidity" when appeals are made to their "gambling spirit"; that the radio and television contests here under attack, because they offer "something for nothing", make use of this cupidity to arouse the gambling spirit and thereby damage the moral fibre of the American people; that, since the "evil" is the same, the programs must be considered to be prohibited by the statutes.

If Congress intended the Commission or the courts to have a roving commission to stamp out the "gambling spirit", language would not have been difficult to find in which to express it. The present statute certainly does not.

Nothing could be further from the truth, however, than to suggest, as the Commission does, that the decision below is based upon the theory that the lottery statutes were designed solely to prevent the "impoverishment of the poor."

The answer is obvious and rests in avoiding such doctrinaire distinctions. Congress is no doubt interested in avoiding the impoverishment of the poor. Congress may also have had in mind that some manifestations of the "gambling spirit" are undesirable, but Congress in passing the lottery statutes had no such great ends in mind as the Commission credits it with. It instead was attacking specific activities of which it disapproved.

In its brief in support of its appeal, the Commission has also committed itself without reservation to an interpretation of the law which is not to be found in the rules which it seeks to have upheld,—a position perhaps suggested to it by the dissenting opinion of Judge Clark below—that

"surely the yield to the operator is all important" (110 F. Supp. at 393; FCC Br. pp. 22-3, 47-51).

"Price" in this view is nothing more than a touchstone determining whether a particular award is a gift, resulting from mere altruism, or a prize, constituting part of a commercial scheme intended to result eventually in profit. If the award is the latter, it necessarily constitutes an illegal lottery (assuming the presence of chance). Only if, according to Judge Clark and the Commission, the award is made by an eccentric millionaire is consideration not present.

It is not difficult to demonstrate the absurdity of this analysis, quite apart from its lack of consistency with the concern over the "gambling spirit" evidenced elsewhere. Turning from the eccentric millionaire to a more immediate illustration, the analysis on which Judge Clark and the Commission have relied leaves entirely unanswered the question of the status of a contest program in all respects similar to the programs which the Commission insists are illegal, but conducted without a sponsor, either as a sustaining program on a commercial station, or by a non-profit station operated by an educational institution or a municipality. If WNYC, the New York City municipally owned station, for example, were to conduct a typical radio giveaway program, there can be no question whatsoever that the rules which the Commission is asking this Court to uphold and enforce would be violated by the program, and WNYC would be subject to forfeiture of its license. There is not a hint in the rules or in the Commission's Report—let alone in the statute which these purport to interpret—that a radio station not operating for profit is any more entitled to broadcast lottery information than a commercial station. The fact is, surely, that the presence or absence of a pecuniary benefit to the promoter is not only not "all-

important" but entirely irrelevant to the existence of a prohibited lottery.

Criminal laws are not an appropriate field for the adoption of such doctrinaire positions. It is not for the Commission to determine that something not made a crime by Congress should be treated as such because it is equally harmful. As was said by this Court through Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95 (U. S. 1820):

"It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

The Commission's insistence in its brief that the popularity of broadcast contest programs is due to their appeal to "cupidity" and not to their entertainment value ignores the absence of any finding or evidence to that effect. (See p. 9, *supra*). The only NBC program remaining in the case, "What's My Name?", is conducted in such a manner that the hope of winning a prize could not possibly influence people to listen to the program, which therefore must make its way solely on its value as entertainment. (See pp. 6-7, *supra*). The Order would make the program illegal in any case, however, so that the Commission's present argument is plainly directed against a straw man of its own devising.

Indeed, the Commission's Order, if enforced, will actually outlaw all audience participation contests in the field of radio and television broadcasting, however innocent,

on the ground that they are all lotteries, although audience participation contests are utilized generally in other fields, by teachers as well as by entertainers. This results from the special applications which the Commission makes of the traditional legal tests for lotteries.

"Prize" of course is traditional in any contest, from a school track meet to a bridge club tournament. A contest must have a prize, so radio and television contest programs start with this strike against them.

"Chance" is equally reduced to a matter of course by the Commission's ruling (paragraph (b)) that it is sufficient for chance to play a part in the selection of the contestant. If a contest is to involve live participation by members of a broadcast audience, selection of contestants out of so great a mass without the introduction of a random element would be most difficult; in point of fact, selection is customarily by lot in such programs, the choice being made from those members of the audience who have indicated in writing their desire to participate. Thus the second strike is called by the Commission.

Since the tests of "prize" and "chance" are so easily satisfied, the stage is set for the completely arbitrary result of outlawing audience participation contests in radio and television. This is done by the Commission's categorical position that being a member of the home audience is in itself sufficient consideration. So the program—every such program—is banned.

The last two of the three tests are held by the Commission to be satisfied by what are after all pure technicalities, inherent in the nature of broadcasting. The simple result is to forbid radio and television broadcasters to engage in activity that is innocuous.

II.

The intent of Congress was that Section 1304 should be construed in accordance with the existing law.

Section 1304 of the Criminal Code in effect extended to broadcasting the prohibition against dissemination of lottery information which had long been in effect under federal statutes relating to the mails, and which now is codified as Sections 1301-3 of the Criminal Code. The last revision of the language of the postal lottery laws of any significance occurred in 1909, and that revision was minor. In 1934, when the Communications Act was passed incorporating as Section 316 the prohibition which now constitutes Section 1304 of the Criminal Code, there was a history of interpretation of the postal lottery statutes which had resulted in a well-established meaning for the words "lottery, gift enterprise, or similar scheme." Those words were limited to schemes in which participants were required to furnish a *valuable* consideration, and it was clear that technical contract consideration was inadequate to meet this requirement. See *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916); *Peek v. United States*, 61 F. 2d 973 (5th Cir. 1932).

When Congress chose the identical words to define the broadcasts to be prohibited, it could only have intended that the interpretation established under the earlier statutes should be applied to the new one.

Statutory Derivation.

The Commission's brief cites many of the earlier statutes which preceded the Act of March 4, 1909, in which the prohibition against postal lotteries first assumed the precise

form in which it exists today. However, the quotations fail to disclose what an examination of their context makes clear—that the statutes were plainly and beyond any doubt whatsoever drawn to deal with a situation in which the “price” or “consideration” extracted from the participant took a pecuniary form.

That this was the purpose of the anti-lottery statutes is especially clear from the language of the Revised Statutes. The three sections of the Revised Statutes covering lotteries prohibited sending through the mails material of the types described in the following language:

“Sec. 3929:

“ * * * conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance, or drawing of any kind, or in *conducting any other scheme or device for obtaining money through the mails* by means of false or fraudulent pretenses, representations, or promises, * * *

“Sec. 4041:

“ * * * conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in *conducting any other scheme or device for obtaining money through the mails* by means of false or fraudulent pretenses, representations, or promises, * * *

“Sec. 3894:

“ * * * concerning illegal lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or *concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money* under false pretenses, * * * ”
(Emphasis added in each quotation).

In each instance the emphasis is plain that the schemes which are prohibited are those intended for "obtaining money."

The word "illegal" was deleted from Section 3894 in 1876 (L. July 12, 1876, § 2, 19 Stat. 90), but otherwise there was no change in the language until 1890. In L. Sept. 19, 1890, 26 Stat. 465, the language chosen was:

"* * * concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, * * *"

Both the House and Senate Committee Reports recommending the passage of this statute emphasize that the statute is primarily intended to deal with the sweepstakes type of lottery—specifically the Louisiana State Lottery. The following language of the House Report was adopted and included in its Report by the Senate Committee:

"It is not the object of this report to debate the question as to whether lottery companies are inimical to public morals or of immoral tendency. The day is passed for such discussion. It is admitted, or probably not seriously denied, that the existence of such swindling schemes is promotive of the spirit of gambling, and results in serious disaster to many citizens." (H. R. Rep. No. 2844, 51st Cong., 1st Sess. (1890) p. 4; Sen. Rep. No. 1677, 51st Cong., 1st Sess. (1890) p. 4).

Surely it could not be argued that a statute passed for the purpose of preventing "swindling schemes" was intended to apply to activities such as the broadcast contest program here under attack.

In L. March 2, 1895, 28 Stat. 963, substantially the same phraseology was used except that the references to "obtaining money" through "false pretenses" were eliminated. As the Commission emphasizes in its brief (FCC Br. p. 36), the 1890 and 1895 language, "• • • lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, • • •", is not substantively different from the present language, except in its omission of the words "in whole or in part" in connection with the dependence upon "lot or chance." That addition was made in 1909 (L. March 4, 1909, §§ 213, 214, 237, 35 Stat. 1129, 1130, 1136) and is of course without significance in so far as the question of "price" or "consideration" is concerned.

In 1934, therefore, the operative language with which this case is concerned had been in the federal criminal statutes for approximately forty years. It is of controlling significance that during those forty years application of this language was, without exception, only to schemes in which a *valuable* consideration was required of the participant. The derivation from earlier statutes which described the prohibited activity in greater detail and emphasized the function in the statutory scheme of "obtaining money" allows little doubt that the courts which so limited the statute reached the only possible interpretation; certainly the Commission's suggestion that the language is broad enough to cover situations where nothing is extracted from the contestant except his attention to the contest would have seemed hardly tenable.

However, even if this interpretation were considered to be erroneous if reviewed as a matter of first impression, the fact that Congress in 1934 chose for Section 316 of the Communications Act language which had received such an

interpretation establishes the meaning which Congress intended the new statute to have.*

Judicial Interpretation of the Postal Lottery Statutes.

The case of *Post Publishing Co. v. Murray*, 230 Fed. 773 (1st Cir. 1916), *cert. denied*, 241 U. S. 675 (1916), is generally considered to be the leading case on the interpretation of the federal postal lottery statutes. The Boston Post developed an advertising scheme consisting of publishing pictures of Boston ladies shopping, but with the heads cut off the photographs. Each lady who recognized her picture won five dollars. The papers were excluded from the mails by the Postmaster. The Court of Appeals for the First Circuit unanimously held the scheme legal, and directed that the newspaper should get the relief it sought from the Postmaster's order.

The court said:

"The advertisement, or scheme, in question does not seem to be like any of the kinds or types of wrong against which the act of Congress was directed. It did not present a lottery scheme, because a lottery involves a scheme for raising money by selling

* While the legislative history of this Section of the Communications Act of 1934 is unilluminating, the corresponding Section of the Davis Bill, H. R. 7716, 72d Cong., 1st Sess. (1932), a predecessor bill containing a similar prohibition, was expressly commented on by its sponsors. Thus H. R. Rep. No. 221, 72d Cong., 1st Sess. (1932), states as a reason for adopting a prohibition of lottery broadcasting:

"Furthermore, the broadcast of such information is unfair to the newspapers, which are forbidden the use of the mails, if they contain such information."

Similar language is present in Sen. Rep. No. 564, 72d Cong., 1st Sess. (1932), and was used by the Senate managers in explaining the bill on the floor of the Senate (76 Cong. Rec. 3767-8). This seems clearly to indicate an intent to prohibit only such subject matter as the postal lottery laws prohibited to newspapers.

chances to share in a distribution of prizes—a scheme for the distribution of prizes by chance among persons purchasing tickets. It was not a gift enterprise, because a gift enterprise contemplates a scheme in which publishers or sellers give presents as an inducement to members of the public to part with their money. *Nor did it present the kind of lot or chance which the act of Congress was striking against, because the particular kind of chance involved in the advertisement in question did not require a parting with anything by members of the public for the prize offered.*

• • • • •

“The advertisement in question, while ingenious, and rather gruesome in some of its phases, after all involved only harmless novelty, promoted probably by the radical change in women’s street costume, and carried forward with the purpose of attracting attention to the newspaper and of increasing its circulation, rather than as a scheme involving direct and specific intent to induce members of the public to part with money, which seems to be a necessary element of the statute against lotteries, gift enterprises and games of chance.

• • • • •

“We only refer to the interesting discussion by Chief Justice Perley, with reference to gift enterprises. *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723. The federal statute, generally speaking, is in conformity with substantially similar statutory enactments in the various states, and the opinion of Chief Justice Perley is interesting, because it points out, in a very clear way, the idea that these statutes are effective against enterprises and schemes which induce or cheat members of the public into parting with their money on the idea that they are to get something through lot, chance, or expectancy, with

the result, in the end, of being cheated" (pp. 775-777). (Emphasis added)

While other cases did not discuss in detail the nature of the consideration required, they present sufficient corroboration of the *Post Publishing* case to make it clear that this was the view generally accepted in the federal courts. Thus in *Peek v. United States*, 61 F. 2d 973 (5th Cir. 1932), the court said:

"A 'lottery' is usually defined as 'a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize.' 38 C. J. p. 287; Webster's International Dictionary. . . . We considered this statute recently in *Boasberg v. United States*, 60 F. (2d) 185, 186, saying: 'To be like a lottery there must be something staked, a larger possible winning, and the winning or losing must depend on lot or chance and not on skill or judgment.'" (p. 974)

In *United States v. Hughes*, 53 F. 2d 387 (S. D. Tex. 1931), which found a lottery to exist, it was pointed out:

"The indictment alleges sums of money paid to defendants by the beneficiaries. This is I think a sufficient allegation of consideration." (p. 390)

It is pointed out above that the reasoning of *Horner v. United States*, 147 U. S. 449 (1893), assumes the necessity for finding valuable consideration, which of course it was readily able to do, since money was in fact paid. (*supra*, pp. 17-18).

We are aware of no case which has suggested that under the federal postal lottery statutes anything less

than money or a "valuable consideration" would be sufficient.*

Under the circumstances it is submitted that the District Court was clearly correct when it said:

"The Federal lottery statute does not define a lottery. The term 'lottery' should be given its usual or popular meaning. Since it was part of the Federal Criminal Statute for so many years before the Federal Communications Act was adopted in 1934, the term 'lottery' should, in interpreting Section 316 of the Federal Communications Act, be given the interpretation which it had received in cases construing former Section 336 of the Federal Criminal Code. *Brown v. Duchesne*, 19 How. 183, 60 U. S. 183, 15 L. Ed. 595; *Burnet v. Harmel*, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199; *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342, 57 S. Ct. 452, 81 L. Ed. 685; *N. L. R. B. v. John W. Campbell, Inc.*, 5 Cir., 1947, 159 F. 2d 184." (110 F. Supp. at 382)

* The view of the *Post Publishing* case remains the law today. Attention has been called above to the case of *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E. D. N. Y. 1951) (*supra*, pp. 21-22), and the adoption by the Court of Appeals of this decision (over Judge Clark's objections) in 192 F. 2d 240 (2d Cir. 1951). *Affiliated Enterprises, Inc. v. Gruber*, 86 F. 2d 958 (1st Cir. 1936), did not involve the federal statutes except indirectly, since it turned on the question of whether Bank Night was an illegal scheme which a court of equity would not protect against copyright infringement and unfair competition; it cites, however, the *Post* case and numerous state cases, and follows them as to the necessity of a valuable consideration. *Affiliated Enterprises v. Gantz*, 86 F. 2d 597 (10th Cir. 1936), reached the opposite result on similar facts, considering the grant of free chances a subterfuge. As has been pointed out above, this result is equally based on the rule that valuable consideration is necessary, and represents only a difference in interpretation of the factual significance of the free chance device in Bank Night. Other cases, such as *United States v. Rich*, 90 F. Supp. 624 (E. D. Ill. 1950), which have found consideration present within the meaning of the statutes, are consistently cases where a money consideration is in fact paid.

The Commission suggests that the court below was overlooking the words "or similar schemes" in the statute. As far as we are aware, however, there has never been any such distinction made in any federal case. The words "lottery, gift enterprise or similar scheme" have been in the federal statutes since 1909, and the traditional tests of chance, prize and consideration have always been held applicable to the entire phrase. A "gift enterprise", as has been shown above, is simply a type of lottery; a "scheme" not of the same nature would hardly be "similar" to either "lotteries" or "gift enterprises."

The direct answer to the Commission's argument that the words "similar schemes" should now, 44 years after their original insertion into the postal lottery statute, be held to cover the broadcast of telephone giveaway programs, is that no such substantive change in the criminal law should be permitted to result from a mere administrative reinterpretation.

The Interpretation of the Postal Authorities.

The Commission's brief is in error, no doubt unintentionally, in its suggestion at page 63 and in note 48 of its brief that the Post Office Department's position on the interpretation of the postal lottery statutes is or has ever been that "trouble or inconvenience, even of a slight degree" constitutes sufficient consideration to support the condemnation of a particular enterprise as a lottery.

In point of fact, this is not the Post Office Department's position, and none of its bulletins on the proper interpretation of the postal lottery laws supports the Commission's argument. Judge Thomas in his book, relied upon and quoted from by the Commission, was stating his personal views on the subject, not those of the Post Office Department.

The latest postal bulletin quoted in the footnote on page 63 of the Commission's brief supports not the Commission's position, but the decision of the Court below. It requires at least "an expenditure of substantial effort or time" before there is the consideration to support finding an enterprise to be a lottery.

An earlier ruling dated February 13, 1947 appears in the record at pages 229-230. The operative paragraph reads:

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. *On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.*" (R. 230) (Emphasis supplied)

Contrary to the Commission's argument, this view is in complete disagreement with both Judge Thomas's statement and with the Commission's suggestion that the most minuscule consideration, even attention to the contest itself, is consideration, since "the yield to the promoter is all important."

The best evidence of the Post Office Department's attitude is the rulings which it has given on the very type of program here under attack. In 1949 the Solicitor of the Post Office Department ruled that material relating to "Stop the Music" would be mailable (R. 27). In 1950, he ruled that material relating to a contest conducted on a program called "Truth or Consequences" would be mailable (R. 25).

While earlier rulings on the program "Mu\$ico" had been conflicting, in 1949 the Solicitor of the Post Office Department expressed the view that if the program were to be resubmitted, it would be held not to conflict with the postal lottery laws (R. 229). As the record makes clear, each of these programs involved all of the elements which under the interpretation reflected in the Commission's Order would make them lotteries.

The Established Interpretation of the Lottery Laws Should Not be Enlarged without Affirmative Congressional Action.

For 20 years since the Communications Act of 1934 became law telephone giveaway programs have been broadcast on the assumption that they were legal. The Justice Department and the Post Office Department, interpreting the lottery statutes committed to their administration by Congress, appear to have agreed. Indeed the Commission in 1943 agreed and recommended a change in the statute (R. 27-30; p. 9, *supra*).

It should not be in the province of any administrative agency to declare illegal what has so long been construed as legal. This Court's recent decision in *Toolson v. New York Yankees, Inc.*, 346 U. S. 356 (1953), is directly applicable. The Court there said:

"In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop,

on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." (pp. 356-57)

In the present case, to be sure, there is no controlling decision of this Court, but on the other hand the lower court decisions which the Commission wishes to have overruled were the most authoritative interpretations of the federal lottery laws at the time Congress was extending that law to the new field of broadcasting. Further, when Congress was asked by Chairman Fly to take specific action against radio giveaways, its failure to act could only be construed by broadcasters as a reaffirmation that Congress did not consider the programs to be harmful. The *Toolson* case is a clear authority that under such circumstances changes in the law should be accomplished only by legislation.

In the very field of lottery law this Court, in *United States v. Halseth*, 342 U. S. 277, 280, 281 (1952), expressly condemned an administrative enlargement of the scope of Section 1301 of the Criminal Code, prohibiting interstate transportation of lottery materials. There the Post Office Department had several times requested Congress to amend the statute to cover punchboards. No such amendment was ever adopted, but an attempt was made to prosecute the transportation of punchboards under the existing section. The Supreme Court, pointing out that a penal statute should be strictly construed, refused to interpret the statute as covering punchboards. If an addition to the law was to be made, the Court observed, "• • • it is for Congress to make the addition" (p. 281). If contest programs which have been broadcast for 20 years and which neither the

Department of Justice nor Congress has seen fit to take action against, are now to be added to "schemes" held to be lotteries, "it is for Congress to make the addition."

III.

The Commission's Order in its original form exceeded its statutory authority.

The Order is Contrary to Section 326 of the Communications Act.

The extension of the Commission's powers to include the prohibition of specific programs violates both the spirit and the letter of Section 326 of the Communications Act of 1934. That Section reads as follows:

"Sec. 326. *Censorship.*

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

In its discussion of the arguments presented to the District Court the Commission conspicuously omits any reference to Section 326 (FCC Br. pp. 12-14). That section, however, is an essential part of the basic argument that the Order is outside of the Commission's statutory authority, for it expressly limits the interpretation of the rest of the act. It forbids any construction of the sections granting general rule-making and licensing powers which would permit the Commission to exercise "the power of censorship."

It was the Commission's position below that such cases as *National Broadcasting Co. v. United States*, 319 U. S.

190 (1943), which have upheld the enforcement against broadcasting stations of economic regulations, and cases which have held the First Amendment inapplicable to protect criminal conduct, have established that the Commission's regulations do not violate Section 326 (FCC Reply Brief in District Court, pp. 7-10).

But this interpretation deprives Section 326 of any content. Censorship would not necessarily have been unconstitutional. Not only is it regularly carried on in time of war, but even today, under the decisions of this Court, state and local agencies continue to exist for the sole purpose of censorship. Congress did not, however, forbid *unconstitutional* censorship; it forbade *all* censorship.

If the word "censorship" has any meaning at all, it must include the advance regulation of program content by absolute prohibitions under threat of revocation of licenses, as well as by any requirement that scripts be submitted for approval.* The only reasonable interpretation

* There is a striking similarity in operation between the Commission's Order and the statute which this Court held unconstitutional in *Near v. Minnesota*, 283 U. S. 697 (1931). The *Near* case involved a Minnesota criminal statute forbidding the publication of a malicious, scandalous or defamatory newspaper. Upon conviction a permanent injunction might issue against publishing "a malicious, scandalous or defamatory newspaper." This Court held the statute unconstitutional as an infringement of the freedom of the press, relying primarily on the argument that the injunctive provisions constituted a previous restraint with respect to all subsequent publications. An injunction against future publications in such broad language, by bringing to bear the power of summary judgment for contempt, operated so as to deprive the publisher of any freedom of action.

The principal difference between the two situations, is that under the Minnesota statute the injunction could only issue after a trial was held and the defendant had been convicted of violating the law, and the injunction in theory could not prevent continued publication of a proper newspaper. Under the Commission's Order, on the other hand, no conviction whatsoever will be necessary, but only an administrative determination, and thereupon licenses will be refused for all purposes.

of this section is that the function of prohibiting specific programs, even if they would be illegal, was withheld from the Commission, and it could not use its general powers to accomplish such a prohibition indirectly. The section therefore specifically negatives the existence of a legislative mandate *directed to the Commission* to prohibit lottery broadcasts. The mandate exists, unquestionably, but it is addressed to the Department of Justice alone.

The Commission may urge that the absolute advance prohibition of giveaway programs which its Order is admittedly intended to accomplish is not "censorship" as long as the speech to be prohibited is contrary to a general legislative policy against "promoting the gambling spirit".

But to say that advance prohibition of speech is not censorship if the speech is contrary to some general policy is to concede to the censor all he needs for unlimited operation. Censorship in every age and nation has been able to find policy grounds to justify itself. The Commission will not be limited by the lottery laws. Jurisdictionally, indeed, the Commission relies on the supposed principle that in the exercise of its licensing powers it can properly refuse licenses to *anyone* who in its estimation has violated criminal statutes, whether or not ever indicted, tried or convicted of the alleged violation.

It may perhaps clarify this part of the problem to point out that the Commission's position is essentially the same as it would have been if Section 326, instead of *forbidding* censorship by the Commission, had expressly *authorized* the Commission to prohibit particular broadcasts considered against public policy to the full extent permissible under the Constitution. Under such a provision the Commission could have gone no further with respect to prohibiting broadcasts of telephone giveaway programs than it has done here.

The District Court made it clear that the constitutionality of the Commission's actions was dependent on the Order not being enforced against programs which do not actually partake of the evil of lotteries, and that the Commission's jurisdiction was similarly limited to application of established law. It said:

"The Rules of the Commission, in their subject matter (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amendment. [Citations omitted.] But in so far as some of their provisions [paragraph (b)(2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment.

"The merits of the 'give-away' programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that 'we can see nothing of any possible value to society' in these programs, 'they are as much entitled to the protection of free speech as the best of literature' or music. *Winters v. New York*, 333 U. S. 507. When the radio or television audiences tire of them, they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the 'give-away' programs as lotteries, if as a matter of law they are not." 110 F. Supp. at p. 389.

There is a substantial danger in allowing the Commission to go beyond the established authorities in the guise of interpretation, however plausible its reasoning. Freedom to do so would necessarily involve the exercise of personal judgment in the absence of an objective and readily ascertainable standard, which this Court condemned in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952), and in *Superior Films, Inc. v. Department of Education of State*

of Ohio and Commercial Picture Corp. v. Regents of University of New York, U. S. , 22 U. S. Law Week 3193 (1954).

Section 1304 of the Criminal Code Forms No Basis for the Commission's Assertion of Jurisdiction.

The Commission argues that the programs which it seeks to prohibit are allegedly already in violation of Section 1304. If their broadcasting is a criminal offense, it is entirely proper, the Commission urges, to deny licenses to those who broadcast them.

But this involves the determination that particular conduct of a particular person is in fact criminal. It is not the conduct itself which moves the Commission to act, but a determination that there has been a violation of Section 1304. On the basis of such a determination the Commission then imposes what this Court has termed "a penalty and sanction * * * far more drastic than" fines. *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, 418 (1942).

The Commission does not propose to wait for a criminal conviction, or for the initiation of a criminal prosecution. There is no reason to believe that even an acquittal after a criminal prosecution would protect a broadcaster against a contrary determination by the Commission as to the central elements of the offense involved.

The statute from which Section 1304 of the Criminal Code was derived provided that its penalties should be imposed "upon conviction thereof." The Reviser's Note explains that this was deleted upon codification "as surplusage since punishment can be imposed only after a conviction." See Title 18 U. S. C. Sec. 1304, Reviser's Note.

If the proposed Order becomes effective, there will be no necessity for a conviction before punishment is imposed.

There will be neither an indictment nor a jury trial for the accused broadcaster. All that will be necessary will be an administrative finding of fact by the Commission. Even if this might be proper if the Commission was independently empowered to supervise program content, when it seeks to rest its claim to jurisdiction on the violation of a criminal statute, the question of constitutional safeguards for those accused of crime becomes pertinent.

The Commission may suggest that a clear case of obscenity or subversion of public order would demand action by the Commission if law enforcement agencies should fail to act. Such a case can be decided if it ever arises. All that is at issue here is the Commission's power to act against the broadcast of programs which subvert neither morals nor public order, and which have been consistently considered legal by other public agencies directly charged with the enforcement of the laws.

There is no significant difference between the programs which in 1940 the Commission referred to the Department of Justice for prosecution, the programs which in 1943 it recommended be banned by statute, and the programs which it currently seeks to prohibit through the Order. The Commission has concluded that the only way to accomplish its ends is to take the enforcement of the Criminal Code into its own hands. It is forced into this position because neither the Department of Justice, the appropriate enforcement agency, nor the Congress, the appropriate legislative body, agrees with its views as to the law of lotteries.

The Commission thus is seeking to operate as a censor in the shadowland of personal judgment. It is submitted that it should not be permitted to do so.

The Commission's Views in This Field are Not Entitled to Special Respect.

The Commission's opinion as to the proper interpretation of criminal statutes prohibiting lotteries is not an opinion within the field of its expert knowledge.

The District Court pointed out:

"This is not a case where the Court is asked to set its opinion over and above that of the Commission or of a majority of the Commission's membership. There are seven members of the Federal Communications Commission. The rules under attack were adopted by the action of only four of the members. One of the four dissented. The basis of that dissent was that there was nothing of value given by any of the participants for the chance of winning a prize. If we grant an injunction against the enforcement of Rule (b) (2), (3) and (4) we shall not be holding contra to the view of a majority of the Commission; and our decision will be in accord with opinions, concerning similar 'give-away' programs, rendered by the Attorney General in 1940 although the Attorney General now appears in support of the Commission's new rules.

"These rules do not involve any of the scientific or technical problems of radio or television, or their statistical field and inter-station relationships, concerning which the Commission has expert knowledge. The Commission's opinion, although entitled to respect, is not authoritative. *Interstate Commerce Comm. v. Service Trucking Co.*, 3 Cir., 186 F. 2d 400; *Lincoln Electric Co. v. Commissioner of Int. Rev.*, 6 Cir., 190 F. 2d 326. We need not consider as applicable the admonition of Judge Frankfurter in *National Broadcasting Co. v. United States*, 319 U. S. 190 at page 218, 63 S. Ct. 997, 87 L. Ed. 1344, that the courts should hesitate to substitute their own views for those of the Commission in matters

peculiarly within the knowledge and experience of the Commission. The basic question presented on these motions is the interpretation of the lottery statute, §1304, and its application to the types of programs condemned by the Commission's Rules. That is a legal question and peculiarly within the province of the courts" (110 F. Supp. 388-9).

It is respectfully submitted that the opinion of the court below goes to the extreme limit of approving activity by the Commission in a field in which Congress gave every evidence of desiring that the Commission should not act, and which, moreover, is a field customarily and zealously protected by the courts from administrative interference because of the practical danger of restricting freedom of speech.

Conclusion.

Every consideration of both policy and law requires the affirmance of the decision below.

Respectfully submitted,

PAUL W. WILLIAMS,
Attorney for National Broadcasting
Company, Inc.

CAHILL, GORDON, ZACHRY & REINDEL,
THOMAS E. ERVIN,
DUDLEY B. TENNEY,
ROBERT KIRTLAND,
Of Counsel.

APPENDIX A.**Text of Statutes Involved.**

Communications Act of 1934, 48 Stat. 1064 (1934), as amended, 47 U. S. C. §151 *et seq.*

SECTION 4(i):

“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”

SECTION 303:

“Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

• • •

“(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.”

SECTION 307(a):

“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.”

SECTION 308(b):

“All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any,

Appendix A.

with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

SECTION 309(a):

"If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

SECTION 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Title 18, U. S. C., Crimes and Criminal Procedure, Chapter 61—Lotteries.

SECTION 1301.

"Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, cer-

Appendix A.

tificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than \$1,000 or imprisoned not more than two years, or both."

SECTION 1302.

"Whoever knowingly deposits in the mail, or sends or delivers by mail;

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes—

Shall be fined not more than \$1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

Appendix A.

SECTION 1303.

"Whoever, being a postmaster or other person employed in the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest, in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than \$100 or imprisoned not more than one year, or both."

SECTION 1304.

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense."

SECTION 1305.

"The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event."

APPENDIX B.

Decisions on the Legality of Bank Night and Similar Schemes.

1. Decisions Holding Bank Night and Similar Schemes Legal.

- People v. Cardas*, 137 Cal. App. 788, 28 P. 2d 99 (1933)
Affiliated Enterprises, Inc. v. Gruber, 86 F. 2d 958 (1st Cir. 1936)
Commonwealth v. Wall, 295 Mass. 70, 3 N. E. 2d 28 (1936)
Griffith Amusement Co. v. Morgan, 98 S. W. 2d 844 (Tex. Civ. App. 1936)*
People v. Shafer, 160 Misc. 174, 289 N. Y. S. 649 (Monroe Co. 1936), *aff'd mem.*, 273 N. Y. 475, 6 N. E. 2d 410 (1936)
State v. Hundling, 220 Iowa 1369, 264 N. W. 608 (1936)
State v. Eames, 87 N. H. 477, 183 Atl. 590 (1936)
State v. Crescent Amusement Co., 170 Tenn. 351, 95 S. W. 2d 310 (1936)
Simmons v. Randforce Amusement Corp., 162 Misc. 491, 293 N. Y. S. 745 (Mun. Ct. 1937)
Dorman v. Publix-Saenger-Sparks Theatres, Inc., 135 Fla. 284, 184 So. 886 (1938)
Darlington Theatres v. Coker, 190 S. C. 282, 2 S. E. 2d 782 (1939)
St. Peter v. Pioneer Theatre Corp., 227 Iowa 1391, 291 N. W. 164 (1940)
State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 Mont. 52, 132 P. 2d 689 (1942)

* There is no inconsistency between this case and those Texas decisions such as *City of Wink v. Griffith Amusement Co.*, *infra*, which held Bank Night illegal. In those cases the Court was convinced that there was no genuine opportunity for persons to participate without paying, while in this case "free play" was a reality. The cases agree that the test is factual—whether the patrons pay in part for their chances.

Appendix B.

Albert Lea Amusement Corp. v. Hanson, 231 Minn. 401, 43 N. W. 2d 249 (1950)*

2. Decisions Holding Bank Night and Similar Schemes Illegal on Ground That Money Was Paid for a Chance.

A. Cases of the gift enterprise type, with chances available only to paying patrons.

Society Theatre v. Seattle, 118 Wash. 258, 203 Pac. 21 (1922)

People v. Miller, 271 N. Y. 44, 2 N. E. 2d 38 (1936)

Shanchell v. Lewis Amusement Corp., 171 So. 426 (La. Ct. App. 1936)

Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc., 276 Mich. 127, 267 N. W. 602 (1936)

United-Detroit Theatres Corp. v. Colonial Theatrical Enterprise, Inc., 280 Mich. 425, 273 N. W. 756 (1937)

Commonwealth v. Payne, 307 Mass. 56, 29 N. E. 2d 709 (1940)

B. Free play held not to change the essential nature of the scheme but to be merely a subterfuge.

Affiliated Enterprises, Inc. v. Gantz, 86 F. 2d 597 (10th Cir. 1936)

State v. McEwan, 343 Mo. 213, 120 S. W. 2d 1098 (1938)

State v. Schubert Theatre Players Co., 203 Minn. 366, 281 N. W. 369 (1938)

State ex rel. Cowie v. La Crosse Theaters Co., 232 Wis. 153, 286 N. W. 707 (1939)

State v. Jones, 44 N. M. 623, 107 P. 2d 324 (1940)

Kessler v. Schreiber, 39 F. Supp. 655 (S. D. N. Y. 1941)

*The Commission's brief considers this case irreconcilable with the earlier decision of *State v. Schubert Theatre Players Co.*, *infra*. The answer is simply that, while both opinions agree that the test of legality was whether the patrons paid in part for the chance, the difference in the facts of the two Bank Night schemes led to the different results.

Appendix B.

C. Patrons paying admission held to have paid in part for a chance.

- State v. Danz*, 140 Wash. 546, 250 Pac. 37 (1926)
City of Wink v. Griffith Amusement Co., 129 Tex. 40, 100 S. W. 2d 695 (1936)
Jorman v. State, 54 Ga. App. 738, 188 S. E. 925 (1936)
Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N. E. 2d 648 (1937)
State v. Stern, 201 Minn. 139, 275 N. W. 626 (1937)
State ex rel. Hunter v. Fox Beatrice Theatre Corp., 133 Neb. 392, 275 N. W. 605 (1937)
Cole v. State, 133 Tex. Cr. R. 548, 112 S. W. 2d 725 (Tex. Cr. App. 1938)
State v. Robb & Rowley United, 118 S. W. 2d 917 (Tex. Civ. App. 1938)
Commonwealth v. Heffner, 304 Mass. 521, 24 N. E. 2d 508 (1939)
McFadden v. Bain, 162 Ore. 250, 91 P. 2d 292 (1939)
Commonwealth v. Lund, 142 Pa. Super. 208, 15 A. 2d 839, *allocatur refused*, 142 Pa. Super. xxxi (Super. Ct. 1940)
Commonwealth v. McLaughlin, 307 Mass. 230, 29 N. E. 2d 821 (1940)
State v. Omaha Motion Picture Exhibitors Ass'n., 139 Neb. 312, 297 N. W. 547 (1941)

D. Participants viewed collectively held to have paid for a chance.

- Willis v. Young*, [1907] 1 K. B. 448
Barker v. State, 56 Ga. App. 705, 193 S. E. 605 (1937)
Affiliated Enterprises, Inc. v. Waller, 1 Ter. 28, 5 A. 2d 257 (Del. Super. 1939) (Held that participants as a group contributed to fund; also stating, however, that contract consideration would be enough.)
Little River Theatre Corp. v. State ex rel. Hodge, 135 Fla. 854, 185 So. 855 (1939)

Appendix B.

E. Patrons who, as indicated by increased gate receipts, would not have attended but for the Bank Night, held to have paid for a chance.

Central States Theatre Corp. v. Patz, 11 F. Supp. 566 (S. D. Iowa 1935)

Grimes v. State, 235 Ala. 192, 178 So. 73 (1938)

Stern v. Miner, 239 Wis. 41, 300 N. W. 738 (1941) (consideration furnished both by the additional paying patrons who paid for chance, and by others who stood outside)

State ex rel. Draper v. Lynch, 192 Okla. 497, 137 P. 2d 949 (1943)

3. Decisions Holding Bank Night and Similar Schemes Illegal on Grounds Other Than Payment of Money for the Chance.

State ex rel. Beck v. Fox Kansas Theater Co., 144 Kan. 687, 62 P. 2d 929 (1936) (benefit to theater owner)

State v. Dorau, 124 Conn. 160, 198 Atl. 573 (1938) (Connecticut statute dispenses with consideration)

State v. Wilson, 109 Vt. 349, 196 Atl. 757 (1938) (Court approved cases finding consideration in money payment for chance, but found it necessary to adopt contract consideration theory because of a failure of the indictment to allege that theatre admission prices were in fact paid by anyone)

State ex rel. Dussault v. Fox Missoula Theatre Corp., 110 Mont. 441, 101 P. 2d 1065 (1940) (Expressly overruled by *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, *supra*)

Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 28 N. E. 2d 207, *aff'd*, 137 Ohio St. 460, 30 N. E. 2d 799 (1940) (benefit to theater owner)

Furst v. A. & G. Amusement Co., 128 N. J. L. 311, 25 A. 2d 892 (Ct. Err. & App. 1942) (benefit to theater owner, detriment to participants, and payment by some for chance).

**United States District Court, Southern
District of New York**

Civil Action No. 52-38

COLUMBIA BROADCASTING SYSTEM, INC.,
PLAINTIFF-APPELLEE

against

UNITED STATES OF AMERICA, DEFENDANT,
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANT-APPELLANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, the Federal Communications Commission respectfully submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on March 11, 1953.

OPINIONS BELOW

The Report and Order of the Federal Communications Commission is not yet officially reported. It may be found in Vol. I, Part 3, Pike & Fischer R. R. 91:231. The majority and dissenting opinions of the United States District Court for the Southern District of New York are

(1)

not yet reported. Copies of these documents are attached hereto.*

JURISDICTION

The judgment of the specially-constituted, three-judge district court, sustaining in part and setting aside in part the rules adopted by the Federal Communications Commission, was entered on March 11, 1953. A petition for appeal is presented herewith on May 8, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *National Broadcasting Company, Inc. v. United States*, 319 U. S. 190; *Radio Corporation of America v. United States*, 341 U. S. 412.

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which

*(Clerk's Note. These opinions are printed as appendices to the Statement as to Jurisdiction in *F. C. C. v. American Broadcasting Company, Inc.*, No. 117, October Term, 1953, and are not reprinted here.)

prohibits the broadcast of lotteries. The question presented on this appeal is:

1. Whether subdivisions (2), (3) and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTES INVOLVED

18 U. S. C. 1304 and pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*, are set forth in the Appendix hereto.*

STATEMENT

The plaintiff-appellee, Columbia Broadcasting System, Inc., is the licensee of radio and television broadcast stations subject to regulations by the Federal Communications Commission. On August 18, 1949 the Commission adopted a Report and Order, released August 19, 1949, adopting new Sections 3.192, 3.292 and 3.656¹ of its Rules and Regulations (14 F. R. 5432). These rules, which are identical, apply to commercial standard broadcast (AM), FM broadcast, and television broadcast stations, respectively. They were adopted after rule making proceedings con-

*(See Clerk's Note, Page 2.)

¹ Section 3.656 was originally Section 3.692. It was renumbered by the Commission's Sixth Report and Order in Docket No. 8736, *et al.*, adopted April 11, 1952 (17 F. R. 3905).

ducted in conformity to the provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), including notices of proposed rule making, the submission and consideration of briefs and written comments by a number of parties of which appellee was one, and oral argument before the Commission *en banc*, in which appellee also participated.

In its Report and Order adopting the foregoing rules, the Commission recognized that Section 1304 of the Criminal Code, which prohibits the broadcasting of lotteries and similar schemes, is a declaration by Congress directly applicable to exercise of the Commission's power and duty to grant broadcasting licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcasting licenses. The rules provide:

Lotteries and Give-Away Programs—

(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning

any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given

on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellee brought the present action in the United States District Court for the Southern District of New York, under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321-5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009,²

² Public Law 901, 81st Cong., 2d Session, 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under Section 402 (a) of the Communications Act to provide for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present one, which were commenced prior to its enactment. Section 14.

seeking a permanent injunction against enforcement of the rules. The district court granted a temporary restraining order, after which the Commission issued an order suspending the effective date of the rule pending a final determination of the action. The action was heard by the district court (the argument being consolidated with the argument in two companion actions brought by National Broadcasting Company, Inc. and American Broadcasting Company, Inc. (now American Broadcasting-Paramount Theatres, Inc.)) on cross motions for summary judgment. The district court handed down its decision on February 5, 1953, sustaining the Commission's authority to adopt the rules and the interpretation of 18 U. S. C. 1304 contained in the rules, with the exception of subdivisions (2), (3) and (4) of paragraph (b) of the rules. These subsections delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize. The majority of the district court held, Circuit Judge Clark dissenting, that 18 U. S. C. 1304, which the rules interpret, requires the payment of a price or thing of value as the consideration element of a lottery.

Judge Clark, dissenting, ascribed the majority's view to

* * * the odd mistake that what is involved as the "price" or "valuable con-

sideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor," but "It is the value to the participant of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn

to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recognized in the well reasoned cases, such as *State v. Wilson*, 109 St. 349, 196 A. 757, cited below.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves the validity of rules of the Federal Communications Commission with respect to the licensing of commercial television and radio stations which have a significant impact upon the regulation and conduct of all such stations in the United States. Moreover, the rules rest upon an interpretation of a Federal criminal statute upon which the district court divided, and which should receive the definitive consideration of the Supreme Court.

As the record of this case shows, the so-called give-away programs, which offer prizes to members of the home audience as a means of inducing attention to radio and television advertising, have had recurrent periods of great popularity running back at least as far as 1940. During this period they have also been a matter of concern to the Federal Communications Commission, particularly in view of Section 1304 of Title 18, United States Code (formerly Section 316 of the Communications Act), which specifically makes the broadcast of a lottery a criminal offense. In view of the importance of the problem to ad-

ministration of the Communications Act and the uncertainty in which licensees found themselves due to the lack of decisive Federal precedents and extreme confusion among state courts in interpreting state anti-lottery statutes, the Commission undertook rule-making proceedings in aid of its licensing functions in order to clarify the responsibilities of broadcast licensees in this field in advance of individual licensing proceedings. The rules here at issue are the outcome of these proceedings.

The Supreme Court ruled upon the substance of the Federal anti-lottery statutes in the leading case of *Horner v. United States*, 147 U. S. 449. In that case a scheme under which the Austrian Government sold bonds, each bond being accompanied by a ticket entitling the holder to a chance in a drawing for the distribution of large sums of money, was found to be an illegal lottery.³ Since that time the various state anti-lottery statutes and the Federal laws have been interpreted in a great number of decisions bearing on the problem involved in this appeal of what constitutes sufficient consideration to make a scheme a lottery. The result of these divers decisions under divers statutes is considerable confusion; collection of the cases becomes a "barren task," as Judge Clark stated in his dissent in

³ In *Federal Trade Commission v. Keppel*, 291 U. S. 304, the use of a lottery device in selling a product has been condemned as unfair competition.

the court below. The decided cases may be generally catalogued as those requiring a valuable consideration paid directly for the chance to win a prize (see, e. g., *Affiliated Enterprises, Inc. v. Rock-Ola Manufacturing Corp.*, 23 F. Supp. 3 (N. D. Ill.); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608; *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Ct. of Civ. App., Texas)) and those recognizing that a substantial benefit to the promoter which flows from the participants, and is necessary in order to have an opportunity to win, is sufficient to stamp the scheme a lottery (see, e. g., *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A. 2d 257; *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581 (C. C. E. D. N. Y.); *Affiliated Enterprises, Inc. v. Gantz*, 86 F. 2d 597, 599 (C. A. 10)).

Judge Clark in the court below concisely put the purpose of 18 U. S. C. 1304 when he said:

Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner v. United Statse*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrich-

ment which accrues to the manipulators of the scheme.

The programs covered by the rules at issue are lotteries by every realistic standard. "Give-away" programs are obviously not eleemosynary affairs, but are founded upon an expected return in profits to the sponsor and increased sales of radio time on the part of the station. The requirement of a prepaid monetary consideration as an essential element of a lottery, a requirement not in terms found in 18 U. S. C. 1304, is an unrealistic test. The radio stations involved and the promoters of give-away schemes receive tangible benefits from the increased audience lured by hope of winning a prize by chance.

It is submitted that the court below erroneously construed Section 1304, Title 18, U. S. C., and that its decision presents a substantial question of general importance in the regulation of radio and television stations by the Federal Communications Commission.

Respectfully submitted.

BENEDICT P. COTTONE,
General Counsel,

J. ROGER WOLLENBERG,
Assistant General Counsel,

DANIEL R. OHLBAUM,
Counsel,

Federal Communications Commission.

Dated: MAY 8, 1953.

JUN 12

HAROLD B. WIL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

✓ **MAX FREUND,**
Counsel for Appellee.

STANLEY M. SILVERBERG,
ANDREW J. SCHOEN,
ROSENMAN, GOLDMARK, COLIN & KAYE,
Of Counsel.

INDEX

SUBJECT INDEX

	Page
Motion to affirm	1
Supplementary statement of facts	1
A. The Commission's Report and Order	2
B. The decision of the District Court	5
The question raised by appellant is not substan- tial	7
Prayer for affirmance	12

TABLE OF CASES CITED

<i>Affiliated Enterprise v. Gantz</i> , 86 F. (2d) 597	9
<i>American Broadcasting Co. v. United States</i> , 110 F. Supp. 374	5
<i>Boutell v. Walling</i> , 327 U.S. 463	7
<i>Brooklyn Daily Eagle v. Voorhies</i> , 181 Fed. 579	9
<i>Douglas v. Kentucky</i> , 168 U.S. 488	11
<i>France v. United States</i> , 164 U.S. 676	10
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, 192 F. (2d) 240	9, 10
<i>Hannegan v. Esquire, Inc.</i> , 327 U.S. 146	10
<i>Horner v. United States</i> , 147 U.S. 449	9
<i>Phalen v. Virginia</i> , 8 How. 162	11
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773	9
<i>Public Clearing House v. Coyne</i> , 194 U.S. 497	11
<i>Rast v. Van Deman & Lewis Co.</i> , 240 U.S. 342	11
<i>Securities and Exchange Commission v. Chenery</i> <i>Corp.</i> , 318 U.S. 80	5
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134	5
<i>United States v. Alabama Great Southern Ry. Co.</i> , 142 U.S. 615	7

STATUTES CITED

Criminal Code, Sec 1304	4, 9
Pike & Fisher, Vol. 1, (Part 3) 91:231	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION,
vs. *Appellant*,
COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee, Columbia Broadcasting System, Inc., pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the statutory three-judge District Court be affirmed.

Supplementary Statement of Facts

This action and the administrative proceedings giving rise thereto are generally described in the Statement as to Jurisdiction filed by the Federal Communications Commission (hereinafter referred to as the "Commission"). Appellee desires only to supplement the Commission's state-

ment of facts in order that the nature of the Commission's action as well as the grounding of the decision of the District Court below may be somewhat more fully revealed.

A. *The Commission's Report and Order.*—The Commission Rules here involved, relating to so-called quiz-giveaway radio and television programs, were adopted on August 18, 1949, pursuant to a Report and Order of the Commission which is reported in 1 Pike & Fischer R. R. (Part 3) 91:231. The Report and Order and Rules were adopted by three of the seven members of the Commission; one of the Commissioners dissented and three did not participate.

The majority of three, in their Report, explicitly state that the Rules promulgated rest exclusively on such statutory authority as may be drawn from Section 1304 of the Criminal Code which provides:

“§ 1304. Broadcasting lottery information

“Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

“Each day's broadcasting shall constitute a separate offense.”

Thus, the initial paragraph of the Report states that the Rules attached thereto

“set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of

any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest."

The sole question which the Commission is presenting on this appeal is whether "consideration", which the cases say is an essential element of a lottery, is correctly defined in the Commission's Rules.

It is the theory of the Commission's Rules that since a person is not likely to be in a position to answer questions unless he listens to or views a program, he will do so, i.e., listen to, or view, it, and that this constitutes consideration for the purposes of the lottery laws.

The Commission states in its Report:

"* * * We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create 'circulation' as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or service.

"* * * Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results a detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and 'circulation' to the sponsor, and to the sponsor as well, who presents his advertising to the audi-

ence secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen."

Under the Commission's Rules, quiz-giveaway programs are lotteries even though no member of the public is induced to stake any sums of money or anything of value on the promise that he will be given a chance to participate in the contest.

The Report thus states:

"that a scheme may come within the scope of the statutory prohibition, which offers prizes dependent upon lot or chance even where the participants in the schemes are not risking the loss of any money through their participation."

The dissenting Commissioner, however, pointed out that

"The concept of 'lottery' has a long legal history. This provision, or ones similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the term 'lottery' is novel in at least one respect. * * * Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

"I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. * * *"

The Commission's Report states that the validity of the Rules is to be determined only by whether they correctly set forth the elements of a "lottery" within the meaning of Section 1304 and not by whether they correctly set forth

what is proscribed by the words "or similar schemes" in that section of the Criminal Code. The Report states:

" * * * For the purposes of considering whether the rules before us are a proper interpretation of the statute, it is unnecessary to resolve the question of the extent to which the statutory terms 'gift enterprises or similar scheme' may include more than the statutory term 'lotteries'. * * * Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area."¹

B. The decision of the District Court.—The opinion of the three-judge District Court which led to the judgment from which the Commission is here appealing is reported in 110 F. Supp. 374. In that opinion, the majority of the District Court (Judges Leibell and Weinfeld) held that "the act of listening to a broadcast of a 'give-away' program, or viewing it on television, does not constitute a 'price' or 'valuable consideration', which is an essential element of a 'lottery'." 110 F. Supp. at 385. It pointed out (110 F. Supp. at 384, 386, 388) that:

"Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown,

¹ The validity of the Commission's Rules must be judged on the basis of whether they correctly meet the test of consideration enunciated in the cases. This was recognized by the Commission itself in its Report (p. 4) wherein it stated:

" . . . interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret. . . ."

If, therefore, the Rules do not correctly interpret Section 1304, they are illegal and void. See, *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140.

in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. • • •”

• • • • •

“It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. It is the value to the participant of what he gives that must be weighed. What do the prospective participants give? The Commission argues that it is a ‘legal detriment’ to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a ‘price’ or ‘thing of value’ paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. • • •”

“The danger of ‘impoverishment’ to the participants and the development in them of a ‘gambling spirit’ have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, *Horner v. United States*, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237, quotes from decisions and state laws against lotteries, and cites the ‘pernicious tendencies’ which the State laws were designed to prevent. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3) and (4) of paragraph (b) of the Commission’s Rules. Those programs cannot be classed as a ‘reprehensible type of gambling activity which it was paramount in the congressional mind to forbid’. (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote No. 2 above.)” [Case citations omitted]

The Question Raised by Appellant Is Not Substantial

1. It is a fact of the utmost significance in this case that the United States, though a defendant in this action, has not joined in the Commission's appeal. For this is not simply a case in which the failure of the Department of Justice to join in the appeal of an administrative agency may connote only doubts as to the importance of the question presented or skepticism as to the correctness of the agency's factual findings. This is a case in which the Commission's appeal raises a bare legal question with respect to a federal criminal statute whose implementation and enforcement is the primary responsibility of the Department of Justice.

In such a case, the views of the Department of Justice are a matter of prime importance. See, *e.g.*, *United States v. Alabama Great Southern Ry. Co.*, 142 U. S. 615, 621; *Boutell v. Walling*, 327 U. S. 463, 470-471. And, in this case, there is virtually no reason to doubt that the failure of the United States to join with the Commission on this appeal can only mean that, upon full consideration, the Solicitor General has concluded that the Department should adhere to its long-standing view, evidenced by its repeated refusals to invoke Section 1304 against programs such as those here involved (which refusals are hereinafter adverted to), that these programs are not lotteries within the meaning of that penal provision.

The fact is that quiz-giveaway programs similar to those involved in this case were broadcast for a decade, prior to the promulgation of the Rules in 1949, to the knowledge of the Commission. During that period, the licenses of literally thousands of stations, including those owned by appellee, were renewed by the Commission with knowledge of the past broadcast of such programs by stations and that they intended to continue the broadcast thereof.²

² See paragraph Seventeenth of the complaint which is admitted by the answer.

During that same decade the Commission made requests to the Department of Justice to prosecute the broadcast of such programs as violations of the lottery laws. The Department of Justice, however, refused to prosecute.

The Post Office Department ruled that such programs did not constitute lotteries and therefore accepted literature relating thereto for transmittal through the mails.

So also, the Commission attempted to induce Congress to pass legislation specifically prohibiting this type of program but the Interstate Commerce Committee of the Senate, to which the Commission addressed its request, took no action.

The District Court adverted to the foregoing facts when it stated (110 F. Supp. at 388):

"In the legal opinions given by the United States Attorney General to the Commission in 1940 the type of program now condemned by the Commission's Rules as a lottery was held not to be covered by Section 316 of the Federal Communications Act (now § 1304 of the Criminal Code.) [See Exhibits E, F, G, H, I and J annexed to the American Broadcasting Company's affidavit herein.] The Commission thereupon sought to have the Congress specifically prohibit this type of program and wrote Senator Wheeler on December 30, 1943. [See Exhibit 'D' annexed to the American Broadcasting affidavit.] The Interstate Commerce Committee of the Senate (of which Senator Wheeler was Chairman) took no action on Chairman Fly's request."

It is submitted that there is no ground for this Court's putting an interpretation on Section 1304 which the Attorney General has refused to put upon it and which Congress has failed to incorporate in legislation pressed upon it by the Commission.

2. The crucial fact is that no case holds that consideration for purposes of the lottery laws, federal or state, is supplied by merely listening to or viewing a radio or a tele-

vision program. There is no conflict between the holding below and any other decision on this issue.

Indeed there is no judicial decision involving any federal law relating to lotteries which contradicts the rationale of the court below; that the requirement of consideration is met only when contestants directly or indirectly pay money or a like thing of value in return for the opportunity to compete. Every judicial determination as to the meaning of the federal law which we have been able to find accords with the view of the court below. *Post Publishing Co. v. Murray*, 230 Fed. 773 (C. A. 1), certiorari denied, 241 U. S. 675; *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (S. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2). The only cases involving federal law which are relied upon in the Commission's Report and in its Statement as to Jurisdiction are *Horner v. United States*, 147 U. S. 449; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579 (C. C. E. D. N. Y.) and *Affiliated Enterprises v. Gantz*, 86 F. 2d 597, 599 (C. A. 10).

In *Horner*, however, each participant was required to buy a bond in order to be eligible for the prize. And in the *Brooklyn Daily Eagle* case, contestants in an essay contest could compete only if they submitted labels cut from containers of a specified breakfast food. Hence, the expenditure of moneys for the purchase of the breakfast food was a condition on the right to compete for the prize. *Gantz*, a "Bank Night" case, did not involve federal law. It is not, moreover, in conflict with the decision below as a reading of the opinion in that case will demonstrate. In that case consideration was found to exist because members of the public were induced to expend moneys for admission to a theatre in order to compete for a prize.

3. Judge Clark's dissent below advocates an extremely expansive reading of Section 1304. It ignores the fact that

what is here involved is the interpretation of a penal law which this Court has held must be strictly construed. *France v. United States*, 164 U. S. 676, 682-683. It also ignores the basis of the Commission's decision—that the programs here involved fall within the term "lottery" in Section 1304—and seeks, rather, to support the Rules on the ground, explicitly disavowed by the Commission, that if these programs are not lotteries they are, in any event, a "similar scheme". It is significant, too, that the views expressed in Judge Clark's dissent are contrary to those of a majority of his brethren on the Court of Appeals for the Second Circuit in *Garden City Chamber of Commerce v. Wagner*, 192 F. 2d 240, denying stay on the basis of the opinion in 100 F. Supp. 769 (E.D. N.Y.), Judge Clark dissenting.

Judge Clark's approach to this case is squarely inconsistent with that taken by this Court in comparable circumstances. He points out (110 F. Supp. at 393) that the Rules here involved fall within that class of instances in which governments or their agents attempt "to enforce moral precepts which to a large part of the community seem strange and excessively puritanical". But he asserts that, nevertheless, the prohibition, being understandable, should be enforced.

We submit, however, that the proper approach here must be that taken by this Court in *Hannegan v. Esquire, Inc.*, 327 U. S. 146. In that case, this Court said (327 U. S. at 156, 157-158):

"The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. * * * Under our system of Government there is an accommodation for the widest variety of tastes

and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * What seems to one to be trash may have for others fleeting or even enduring values. * * *

We strongly urge that there is no warrant for extending the concept of "consideration" embodied in a penal statute in order to convert what is essentially a matter of taste into a crime. The Attorney General has refused to do this, and Congress has failed to act on the Commission's request for remedial legislation. Whether the problem created by programs falling within the Rules set aside by the court below warrants criminal sanctions is a question which should be squarely faced and decided by Congress before those sanctions are allowed to attach.

4. The purposes of the lottery laws and the evils at which they are directed are stated succinctly in the opinion of this Court in *Phalen v. Virginia*, 8 How. (U. S.) 162 at 167-8, as follows:

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of *gambling* are comparatively innocuous when placed in contrast with the widespread pestilence of *lotteries*. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; *it preys upon the hard earnings of the poor; it plunders the ignorant and simple.*" [Emphasis ours]

Other cases holding that the vice of lotteries is that by appeal to cupidity they lure members of the public to improvidence, are *Douglas v. Kentucky*, 168 U. S. 488 (1897); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342; *Public Clearing House v. Coyne*, 194 U. S. 497.

The lottery laws are aimed at the suppression of schemes which constitute an evil in that they lead to improvidence by, and impoverishment of, the public.

There is no contention, however, that the programs here involved are so injurious to the public or that they are otherwise evil. Thus, the amended complaint alleges as a fact (Complaint, Thirteenth) and defendants by stipulation (Stipulation, par. 1) have admitted that:

“The Commission has made no finding of fact that said programs * * * have had a demoralizing or other deleterious, harmful or evil effect on the public.”

In these circumstances, this Court should not be the first to permit a lottery statute to be applied to a matter wholly different from those it was intended to reach.

Prayer for Affirmance

For the foregoing reasons, it is evident that no substantial question is raised by the Commission's appeal. The judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

ROSENMAN, GOLDMARK, COLIN & KAYE,
By MAX FREUND, a partner,
Attorneys for
COLUMBIA BROADCASTING SYSTEM, INC.,
Appellee.

STANLEY M. SILVERBERG,
ANDREW J. SCHOEN,
Of Counsel.

Dated: May 22, 1953.

(9084)

JAN 26 1954

HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT,

v.

COLUMBIA BROADCASTING SYSTEM, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC.

✓ MAX FREUND,
Attorney for
Columbia Broadcasting System, Inc.

✓ ROSENMAN GOLDMARK COLIN & KAYE,
✓ RALPH F. COLIN,
✓ JULIUS F. BRAUNER,
Of Counsel.

January 26, 1954.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
The Rules Promulgated By The Commission And Their Application To The CBS Quiz-Giveaway Programs	8
The Commission's Report	11
The Decision Of The District Court	14
Summary Of Argument	15
Argument	18
The Commission's Rules Incorrectly Interpret And Apply Section 1304 Of The Criminal Code And Are Arbitrary, Capricious, Illegal And Void	18
1. The English Law	18
2. The Nature Of Lotteries: Historically The Term Lottery Has Meant A Form Of Wager Involving The Payment Of Money Or Thing Of Like Value In Consideration For A Chance To Win A Prize. From The First It Has Been So Understood And Congress, Without Expressly So Stating, Has Indicated That It So Regards It	21
3. The Cases Demonstrate That The Commission's Definition Of Consideration Is Incorrect	25
4. The Commission's Rules Are Inconsistent With Rulings Issued By The Agencies Of The United States Directly Charged With The Enforcement Of The Lottery Laws	35
5. If Section 1304 Of The Criminal Code Is Construed To Make Programs Of The Type Here Involved Illegal, It is Uncon- stitutional In That It Deprives CBS Of Its Property Without Due Process Of Law In Violation Of The Fifth Amendment To The Constitution. It Should Not Be Given Such A Construction Which Will Raise Grave Doubts As To Its Constitutionality	37
6. The Commission's Other Contentions Are Unsound	39
Conclusion To Brief	45

CITATIONS

Cases:

	Page
<i>Affiliated Enterprises, Inc. v. Gants</i> , 86 F. 2d 597	33, 34
<i>Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.</i> , 23 F. Supp. 3 ..	27, 43
<i>Brooklyn Daily Eagle v. Voorhies</i> , 181 Fed. 579	30, 32, 33, 34
<i>Brooks v. United States</i> , 267 U. S. 432	37
<i>Carolene Products Co. v. United States</i> , 323 U. S. 18	37, 38
<i>Clef, Inc. v. Peoria Broadcasting Co.</i> , (not officially reported) (C. Ct. Peoria Cty., Ill.)	34
<i>Cohens v. Virginia</i> , 19 U. S. (6 Wheat.) 264	22
<i>Commonwealth v. Wall</i> , 295 Mass. 70, 3 N. E. 2d 28	29
<i>Douglas v. Kentucky</i> , 168 U. S. 488	26
<i>Fisher's Blend Station v. Tax Commission</i> , 297 U. S. 650, 655	37
<i>France v. United States</i> , 164 U. S. 676, 682-3	37, 45
<i>Garden City Chamber of Commerce v. Wagner</i> , 100 F. Supp. 769, stay den., 192 F. 2d 240; 104 F. Supp. 235	27, 29, 43
<i>Griffith Amusement Co. v. Morgan</i> , 98 S. W. 2d 844 (Tex. Civ. App.) ..	29, 43
<i>Hannegan v. Esquire</i> , 327 U. S. 146	36
<i>Horner v. United States</i> , 147 U. S. 449	30, 31, 32, 34, 40
<i>Lincoln Electric Co. v. Commissioner of Internal Revenue</i> , 190 F. 2d 326	12
<i>Matter of Gregory</i> , 219 U. S. 210	41
<i>Maugh v. Porter</i> , 157 Va. 415, 161 S. E. 242	30
<i>O'Brien v. Scott</i> , 20 N. J. Super. 132, 89 A. 2d 280	42
<i>Peck v. United States</i> , 61 F. 2d 973	27
<i>People v. Burns</i> , 304 N. Y. 380, 107 N. E. 2d 498	29
<i>People v. Cardas</i> , 137 Cal. App. 788, 28 P. 2d 99	29, 43
<i>People v. Shafer</i> , 160 Misc. 174, 289 N. Y. Supp. 649, aff'd., 273 N. Y. 475, 6 N. E. 2d 410	29, 30
<i>Phalen v. Virginia</i> , 49 U. S. (8 How.) 163	22, 25, 44
<i>Post Publishing Co. v. Murray</i> , 230 Fed. 773, cert. den., 241 U. S. 675	26, 27, 29, 43
<i>Rast v. Van Deman & Lewis</i> , 240 U. S. 342	26
<i>Sage Stores v. Kansas</i> , 323 U. S. 32	38
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 318 U. S. 80..	12, 40
<i>Skidmore v. Swift & Co.</i> , 323 U. S. 134	12
<i>State v. Big Chief Corp.</i> , 64 R. I. 448, 13 A. 2d 236	29, 30
<i>State ex rel. Beck v. Fox Kansas Theatre Co.</i> , 144 Kan. 687, 62 P. 2d 929	29, 30
<i>State ex rel. Reges v. Blumer</i> , 236 Wis. 129, 294 N. W. 491	30
<i>State ex rel. Stafford v. Fox-Great Falls Theatre Corp.</i> , 114 Mont. 52, 132 P. 2d 689	29
<i>Stone v. Mississippi</i> , 101 U. S. 814	26
<i>The Lottery Case</i> , 188 U. S. 321	26, 38, 44
<i>United States v. C. I. O.</i> , 335 U. S. 106	39
<i>United States v. Delaware & Hudson Co.</i> , 213 U. S. 366	38
<i>United States v. Halseth</i> , 342 U. S. 277	37, 45

III

Cases—Continued	Page
<i>United States v. Hughes</i> , 53 F. 2d 387	27
<i>Washington Coin Machine Ass'n v. Callahan</i> , 142 F. 2d 97	25, 42
<i>Weaver v. Pulmer Bros. Co.</i> , 270 U. S. 402	37, 38
Statutes:	
Constitution of the United States:	
Fifth Amendment	38
Fourteenth Amendment	38
Title 18, U. S. Code:	
Section 1301	35
Section 1302	35
Section 1303	23, 35
Section 1304	2, 6, 8, 11, 15, 18, 35, 38, 40, 44
Section 1305	15, 24, 35
Title 28, U. S. Code:	
Section 1253	1
Section 2101 (b)	1
Title 39, U. S. Code:	
Section 259	35
Section 732	24, 35
Act of March 2, 1827, section 6, 4 Stat. 238	22
English statutes:	
Betting and Lotteries Act of 1934, 24 and 25 Geo. 5c. 58	18
Miscellaneous:	
48 A. L. R. 1115	30
57 A. L. R. 424	30
101 A. L. R. 1126	30
103 A. L. R. 866	30
109 A. L. R. 709	30
113 A. L. R. 1121	30
120 A. L. R. 412	30
Ashton, A History of English Lotteries (1893)	21, 22
54 C. J. S. 850	41
Final Report of Royal Commission on Lotteries and Betting (1933)	18
H. R. Rep. 2844 p. 4, 51st Cong., 1st Sess. (1890)	24
23 Ops. Atty. Gen. 203 (1901)	41
Pickett, Contests and Lottery Laws, 45 Harv. L. Rev. 1196	25
1 Pike & Fisher Radio Regulation (Part 3), p. 91: 231	1
Report of Committee of the House of Representatives of Pennsylvania on Lotteries (1832)	22
S. Rep. 1579, 51st Cong., 1st Sess. (1890)	24
Spofford, Lotteries in American History (1892)	22
Tyson, A Brief Survey of the Great Extent and Evil Tendencies of the Lottery System as Existing in the United States (1833)..	22
80 U. of Pa. L. Rev. 744	30
U. S. Code Cong. Serv., 1950 Vol. 2 p. 3010	25
18 Va. L. Rev. 465	30

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT,

v.

COLUMBIA BROADCASTING SYSTEM, INC., APPELLEE.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC.

OPINIONS BELOW

The Report and Order of the Federal Communications Commission (hereinafter referred to as "the Commission") (R. 161) adopting the Rules in issue (R. 169) and the dissent of Commissioner Hennock (R. 170) appear in 1 F. R. 5429 and are reported in 1 Pike & Fischer Radio Regulation (Part 3), p. 91:231. The opinion of the District Court below (R. 110) and that of the dissenting Judge (R. 132) are reported in 110 F. Supp. 374.

JURISDICTION

The jurisdiction of this Court to review the judgment of the three-judge District Court below is invoked by the Commission* under 28 U. S. C. 1253 and 2101(b). The

* Though a party defendant to the action below, the United States has not appealed.

judgment of the Court below was entered on March 11, 1953 (R. 296), a petition for appeal was presented by the Commission on May 8, 1953 and the appeal was allowed on the same day (R. 298). Probable jurisdiction was noted by this Court on October 12, 1953 (R. 307).*

QUESTIONS PRESENTED

Whether subdivisions (2), (3) and (4) of paragraph (b) of certain rules adopted by the Commission, interpreting Section 1304 of the United States Criminal Code (18 U. S. C. 1304) which makes illegal the broadcasting of lottery information, correctly define "consideration", an essential element of any lottery.

Whether said Section 1304, as construed by the Commission, deprives Columbia Broadcasting System, Inc. of its property without due process of law in violation of the Fifth Amendment to the Constitution.

STATUTE INVOLVED

The provisions of Section 1304 of the United States Criminal Code are quoted *infra*, p. 11.

STATEMENT

Appellee, Columbia Broadcasting System, Inc. (CBS) desires only to supplement the Commission's statement of the facts.

* In its order noting probable jurisdiction, this Court also consolidated for argument this case and Nos. 117 and 118, *Federal Communications Commission v. National Broadcasting Co., Inc.*, and *Federal Communications Commission v. American Broadcasting Co., Inc.*

This action was instituted below, in a three-judge District Court, by the filing of a complaint by CBS to set aside, annul and permanently enjoin the enforcement of an Order of the Commission and the Rules thereby adopted relative to so-called quiz-giveaway radio and television programs (R. 111). The defendants in the action below were the Commission and the United States of America (R. 244).

Similar and separate actions were commenced by American Broadcasting Company (ABC) and by National Broadcasting Company (NBC) (R. 2, 146).

Counsel for the United States and the Commission conferred with counsel for CBS, ABC and NBC and it was agreed that the cases should all be heard together and should be in such form that there would be no issues of fact (R. 11-12). To that end, each plaintiff, concurrently, amended its complaint and, on the basis of (i) its complaint, (ii) a supporting affidavit and (iii) a stipulation with counsel for the defendants, moved for a summary judgment (R. 11-12, 90, 224, 282). Defendants in each action filed a cross motion for an order dismissing the amended complaint or, in the alternative, for summary judgment (R. 91, 233, 292). Defendants accompanied their motion in each case with an affidavit which did not controvert any facts alleged in the appellees' papers (R. 92, 234, 293).

All of the amended complaints and supporting affidavits were substantially identical (with minor exceptions) (R. 2-10, 12-89, 146-223, 224-231, 245-281, 282-290). The stipulation filed in each case provided that facts set forth

in all the amended complaints and affidavits could be relied upon by all parties in all the actions (R. 1, 145, 244).*

The case below was thus heard by the three-judge District Court on what was, in effect, a conceded statement of facts (R. 131). Those facts are as follows:

CBS is engaged in radio network and television network broadcasting (R. 246).

Its network business consists of the furnishing of programs to radio and television stations for simultaneous or delayed broadcast by such stations (R. 246).

Programs broadcast by radio or television stations are of two types: commercial and sustaining. Commercial programs are those sponsored by an advertiser which pays for the broadcast thereof. Sustaining programs are not sponsored or paid for by any advertiser (R. 246).

CBS, in its network operations, furnishes sustaining programs to its network stations without charge—except in the case of certain types of television sustaining programs. It also furnishes said stations with all commercial

* For example, the stipulation in this case provided, among other things:

“For the purposes of any motions which plaintiff or defendants or both may bring for summary judgment (a) all the allegations of fact set forth in said amended complaint shall be taken as admitted by the defendants and (b) facts set forth in the amended complaints in the companion actions of *National Broadcasting Company v. FCC*, Civil Action No. 52-37, and *American Broadcasting Company v. FCC*, Civil Action No. 52-24, and in the affidavits, or any of them, filed in either of said companion actions by either plaintiffs or defendants therein, and deemed admitted in those actions shall be deemed admitted and part of the record in this action.” (R. 244)

programs which a sponsor wishes them to broadcast and which the stations accept for broadcast. The sponsor pays CBS and the latter, in turn, pays the stations as provided in its contracts with them (R. 246).

CBS invested large sums of money in developing so-called quiz-giveaway programs—both commercial and sustaining—which involve the award of prizes to members of the listening and viewing audiences (R. 246).

Typical of these programs is "*Sing It Again*" (R. 247). On that program performers rendered a popular song with the original lyrics and then repeated it with parody lyrics, describing some person, place, event, or the like. Individuals, selected at random from telephone books, were called on the telephone during the program and allowed to contest for prizes, by identifying the person, place or event described in the parody lyrics which they heard or saw on their radio or television sets.

A prize was awarded to the contestant answering correctly. A lesser prize was awarded a contestant if his answer was wrong. The successful contestant was also granted the opportunity of identifying the voice of an unknown individual (a so-called secret voice) who sang verses giving clues as to his or her identity. Additional clues as to the identity of the secret voice were given on the program and also on other programs. The person identifying the secret voice received the main prize which increased weekly until identification was made.*

* The program had other features, involving studio contestants, which are not here relevant because the Commission's Rules apply only to participation by members of the radio and television audience. See the majority opinion below at R. 118.

On the CBS quiz-giveaway programs, no contestant is asked to pay anything in order to be allowed to compete (R. 249).

Programs such as "*Sing It Again*" concededly "have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public" (R. 1, 5, 244). There has been no finding by the Commission that such programs have had any deleterious or harmful effect on the public (R. 249, 244).

Neither "*Sing It Again*" nor any program similar thereto was ever adjudicated by any court to be in violation of Section 1304 of the United States Criminal Code, or any criminal statute, and no criminal proceeding was ever instituted against any person, firm or corporation on the ground that any program similar to said program violates a criminal statute, state or federal (R. 249).

Quiz-giveaway programs, similar to those involved in this case, were broadcast for a decade, prior to the promulgation of the Rules in 1949, to the knowledge of the Commission (R. 252). During that period, the licenses of literally thousands of stations, including those owned by CBS, were renewed by the Commission with knowledge that the stations had broadcast such programs in the past and intended to do so in the future (R. 252).

During that same decade the Commission made repeated requests to the Department of Justice to prosecute stations for the broadcasting of such programs as violations of the lottery laws (R. 285-287, 30-63). The Department of Justice, however, refused to prosecute (R. 286, 287, 42, 46, 49, 63).

The Post Office Department has ruled that such programs do not constitute lotteries and therefore has accepted literature relating thereto for transmittal through the mails (R. 284-5, 287, 24-27).

The Commission, in December 1943, requested the Senate Interstate Commerce Committee to amend the lottery law so as to proscribe quiz-giveaway programs. The Commission stated that it was unable to deal with the problem under the lottery statute and submitted a draft of new legislation to bar such programs (R. 28). The Senate Committee took no action on this request.

Despite this history of interpretation by all administrative agencies charged with the enforcement of the lottery laws that the quiz-giveaway programs, such as those here involved, did not constitute lotteries, the Commission on August 5, 1948 gave notice that it proposed to issue rules similar to those at bar (R. 249, 157). It issued a supplemental notice of its proposed rule making on August 27, 1948 (R. 249, 159). On October 19, 1948, the Commission, sitting *en banc*, heard oral argument (R. 249). CBS and others, with the permission of the Commission, having theretofore filed briefs, appeared and made an oral argument in opposition (R. 249-250). No evidence was taken by the Commission (R. 250).

The Commission issued its Rules pursuant to an Order entered on August 18, 1949 (R. 250, 169). The Commission accompanied them with a Report setting forth its reasons as to why said Order and Rules were valid (R. 250, 161).

Only four of the seven members of the Commission participated in the adoption of said Order and Rules (and accompanying Report)—and of those four, one dissented (R. 250, 161).

The Commission's Rules proscribe CBS quiz-giveaway programs such as "*Sing It Again*" as in violation of Section 1304 of the United States Criminal Code (R. 253). The Commission therefore will not renew the licenses of stations owned by CBS and of its network affiliate stations when they come up for renewal and it will deny all applications for licenses by them unless CBS and its affiliates refrain from broadcasting such programs (R. 253).

**THE RULES PROMULGATED BY THE COMMISSION AND
THEIR APPLICATION TO THE CBS QUIZ-GIVEAWAY
PROGRAMS OF THE TYPE HEREINABOVE DESCRIBED**

The Rules relative to quiz-giveaway programs, promulgated by the Commission, provide as follows (R. 169-170):

"Lotteries and Give-Away Programs: (a) An Application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See 18 U. S. C. Sec. 1304).

"(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is

dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize,

“(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

“(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

“(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

“(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.”

Hereinafter the Commission's definitions of consideration in the above subdivisions numbered (1), (2), (3) and (4) will be referred to, for convenience, by those numbers.

Of the four definitions of consideration enunciated by the Commission, definitions (1) and (4) clearly are inapplicable to CBS programs of the type described above. The CBS programs do not require the winner or winners, as a condition of winning, to furnish any money or thing of value or to have in his possession any product sold, manufactured, furnished or distributed by the sponsor or the station [Definition (1)]. So also, those programs do not require the winner or winners to answer the phone or write a letter in a prescribed manner or with a prescribed phrase [Definition (4)].

Technically, the CBS programs of the type described above do not come within the confines of definition (2) enunciated by the Commission because the winners on such programs are not *required* to be listening to or viewing the same as a condition of winning a prize. However, few contestants, selected from the radio or television audience, would be in a position to answer correctly the questions asked of them on such programs without listening to or viewing them. Thus, the Commission evidently contends that definition (2) is applicable to the aforesaid programs because in practice a person could not answer the questions correctly unless he had been listening to or viewing them and therefore, in effect, he is required to do so.

The CBS programs come within the confines of definition (3) because aids in the form of hints or clues to the correct answers to questions were given on said programs. It seems to be the Commission's theory, that since a person is not likely to have the information needed to answer questions correctly, unless he listens to or views a program, he will be induced to listen to or view it, and that this constitutes consideration for the purposes of the lottery laws.

The CBS programs described above are condemned as lotteries under definition (3) and evidently will be so considered under definition (2) of the Commission's Rules although no member of the public is induced to stake any sum of money or anything of value.

THE COMMISSION'S REPORT

The three majority Commissioners in their Report set forth (R. 161) that the Rules constituted the Commission's interpretation of Section 1304 of the Criminal Code which provides (18 U. S. C. 1304):

"Broadcasting lottery information—Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

The Commission's Report states that the validity of the Rules is to be determined only by whether they correctly set forth the elements of a "lottery" and not by whether they correctly set forth what is proscribed by the words "gift enterprise, or similar scheme" in said Section 1304 of the Criminal Code. The Report thus recites (R. 167):

" * * For the purposes of considering whether the rules before us are a proper interpretation of*

the statute, it is unnecessary to resolve the question of the extent to which the statutory terms 'gift enterprises or similar scheme' may include more than the statutory term 'lotteries'. * * * Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area."*

The Commission's theory of consideration is enunciated in its Report as follows (R. 168-169):

"* * * We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as deter-

* Since the Commission itself purported to define consideration in accordance with the rulings of the courts, the validity of its Rules must be judged on the basis of whether they correctly meet the test of consideration enunciated in the cases. See, *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 87; *Skidmore v. Swift & Co.*, 323 U. S. 134, 140; *Lincoln Electric Co. v. Commissioner of Internal Revenue*, 190 F. 2d 326 (C. A. 6). This was recognized by the Commission itself in its Report wherein it stated (R. 165):

"... interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret. . . ."

The Commission's brief in this Court states (p. 14):

"... the rules are specifically intended to interpret the criminal statute and do not purport to go beyond it. If the rules do go beyond the statute, they fall for that reason. . . ."

mined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create 'circulation' as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or services.

"* * * Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and 'circulation' to the sponsor, and to the sponsor as well, who presents his advertising to the audience secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen."

The dissenting Commissioner, however, pointed out that (R. 171):

"The concept of 'lottery' has a long legal history. This provision, or ones similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the term 'lottery' is novel in at least one respect. * * * Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

"I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts.
• • •"

THE DECISION OF THE DISTRICT COURT

The majority of the District Court (Judges Leibell and Weinfeld) (110 F. Supp. 374 at 385) held that "the act of listening to a broadcast of a 'give-away' program, or viewing it on television, does not constitute a 'price' or 'valuable consideration', which is an essential element of a 'lottery'." It therefore granted the motions of CBS, NBC and ABC for summary judgment to the extent of permanently enjoining the Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of its Rules.

Its opinion pointed out (110 F. Supp. at 385, 386, 388) that:

"Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown, in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. • • •"

• • •

"It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. It is the value to the participant of what he gives that must be weighed. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true.

But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. * * *

"The danger of 'impoverishment' to the participants and the development in them of a 'gambling spirit' have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, *Horner v. United States*, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237, quotes from decisions and state laws against lotteries, and cites the 'pernicious tendencies' which the State laws were designed to prevent. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules. Those programs cannot be classed as a 'reprehensible type of gambling activity which it was paramount in the congressional mind to forbid'. (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote No. 2 above.)" [Case citations omitted]

SUMMARY OF ARGUMENT

Neither Section 1304 of the United States Criminal Code* nor any of the other federal statutes relative to lotteries,

* Section 1304 proscribes "lottery, gift enterprise, or similar scheme," but for convenience we group them all and refer to lotteries. Our remarks in this summary of argument are equally applicable to gift enterprises and similar schemes. It will be shown later in the brief that the outcome of this case is not affected by the presence of the words "gift enterprise, or similar scheme" in the statute.

states in so many words that "consideration" is a necessary constituent of a lottery. It is generally agreed, however, and the Commission concedes, that something more than the mere offering of a prize dependent in whole or in part upon lot or chance is required for a lottery.

The language of the statutes themselves makes this obvious. For if Congress had intended to prohibit the offering of prizes dependent in whole or in part upon lot or chance without more, it would not have used the word "lottery" in the statutes. A prohibition against the offering of prizes dependent in whole or in part on chance would have sufficed.*

The something more required to make the offering of a prize, dependent in whole or in part on chance, a lottery is "consideration" which has been defined by the courts as the payment of money or like thing of value in return for a chance to win a large prize. This test of consideration is one which was designed to meet and protect against the evils of lotteries. It is a test which is specific and definite.

Lotteries have always been regarded as forms of wager or gambling in which money or a similar thing is paid for the grant of a chance to win. So also, it has always been

* It is interesting to note that when, as observed above, the Commission submitted to the Senate Interstate Commerce Committee a draft of new penal legislation making quiz-giveaway programs illegal, that draft, insofar as here pertinent, read as follows (R. 30):

"No person shall broadcast by means of any radio station . . . and no person operating any such station shall knowingly permit the broadcasting of, . . . (b) any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance".

understood that the evil which lottery laws were designed to eliminate was the improvident expenditure by the public of its substance induced by the lure of a chance to win.

Under subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules, the mere act of listening to a radio program or viewing a television program by the public constitutes consideration—even though no member of the public is promised or told that he will be given a chance to contest for a prize if he does listen or view the program involved.* Under the Commission's definitions, there is no element of a wager or a gamble.

The Commission's test of consideration extends the application of the lottery laws to situations where the evil against which the lottery laws were designed to protect is not present. The fact is that the Commission has not found that quiz-giveaway programs have a deleterious or otherwise evil impact upon the public (R. 249, 244). On the contrary, such programs concededly have not tended to demoralize or degrade the public, but have provided information and entertainment for the public (R. 5, 1, 244).

The Commission has purported to predicate its interpretation of consideration on the decisions of the courts. The decisions do not support its interpretation and therefore its Rules are illegal and void. Furthermore, its interpretation of consideration is contrary to the rulings of the administrative agencies of the United States—the Department of Justice and the Post Office Department—which are directly concerned with the enforcement of the lottery laws.

* Under subdivision (2) required listening or viewing is the test. Under subdivisions (3) and (4) the mere fact that a contestant will receive assistance in winning a prize if he is listening or viewing constitutes consideration.

Although the United States was a defendant below, the Department of Justice did not appeal to this Court.

Section 1304 of the Criminal Code, as construed by the Commission, is unconstitutional in that it deprives CBS of its property without due process of law in violation of the Fifth Amendment to the Constitution. Congress cannot declare transactions or activities in interstate commerce illegal unless they have a demoralizing or evil effect on the public. The programs here involved have no such effect.

To say the least, the Commission's construction of Section 1304 gives rise to grave constitutional questions.

If Section 1304 is susceptible of two constructions (and we submit it is not), one of which raises serious constitutional questions and the other of which does not, the latter construction should be adopted.

ARGUMENT

THE COMMISSION'S RULES INCORRECTLY INTERPRET AND APPLY SECTION 1304 OF THE CRIMINAL CODE AND ARE ARBITRARY, CAPRICIOUS, ILLEGAL AND VOID.

1. *The English Law*

At the outset, we advert to the Final Report of Royal Commission on Lotteries and Betting (1933), which culminated in the Betting and Lotteries Act of 1934 (24 and 25 Geo. 5 c. 58), because of the reliance thereon by the Commission in its brief wherein it states (p. 30): "The English statute is similar to the pattern of the legislation adopted by Congress in that it contains no limiting definition and does not mention pecuniary consideration as a necessary element."

The Report of the Royal Commission does not support but rather rejects the theory of consideration enunciated by the Rules here under attack. The Report establishes that the lottery laws do not apply unless there is a wager wherein someone pays money or something of value for a chance. It shows the principle underlying the lottery laws to be that the public should not be encouraged to spend its substance for a chance to win a large prize. The Royal Commission's Report thus states:

"What is a Lottery?"

. . .

"Some of the earlier Lotteries Acts stigmatised certain types of schemes as lotteries, but the later Acts do not define what is a lottery and thus leave it to the Courts to decide whether a given scheme is or is not a lottery. The case law on the subject of lotteries is therefore of great importance. (p. 23)*

"81. Before a scheme becomes a lottery there must be an element of chance and *an element of wager*. (p. 23) (Emphasis ours)

. . .

"455. These large prizes are a dazzling lure to the ordinary man or woman. To all but a few thousand people in this country, a sum of, say, £30,000 seems to offer a transformation of their lives. So attractive is the lure that most of those who take chances in a large lottery do not take the trouble to ascertain how small is the *value of the chance purchased by them*, or how infinitesimal is the possibility of their winning a prize. (pp. 131-132) (Emphasis ours)

* Numerals in parenthesis refer to the pages of the Royal Commission's Report wherein the quoted material appears.

"Lotteries appeal with especial force to those in straitened circumstances, and to those in economic insecurity, since they hope to gain financial stability by winning a prize. The number of people in such circumstances is unfortunately high, and lottery tickets are *purchased with money* that for the sake of well-being should have been spent otherwise. (p. 132) (Emphasis ours)

"456. The effects of large lotteries upon character are more subtle and harder to determine but may well be more important in the long run than the material results. (p. 132)*

* * *

"528. Prohibition of Entry Money.—We refer in paragraph 509 to the Bills promoted before the War to prohibit newspaper competitions in which money or coupons had to be returned with entries. Several witnesses favoured the adoption of this proposal, which accords with *the principle underlying the laws against lotteries, namely, that the public should not be encouraged to spend their substance in this way.*" (pp. 154-155) (Emphasis ours.)

The Royal Commission's Report also made it clear that it regarded lotteries as a species of schemes or devices for obtaining *money or property* by false pretenses. It thus stated (p. 130):

"449. * * * The experience of this and other countries shows that lotteries lend themselves very easily to exploitation and fraud. There is great

* The Commission's brief (p. 32) quotes only this one sentence from the Royal Commission's Report. The Royal Commission's Report makes it plain that it is the wager of one's money or like thing of value for a chance, which has the evil impact upon character referred to in said Report.

scope for running up unnecessarily large or fictitious bills for expenses, or for the payment to the promoters of salaries or commission on a lavish scale. There are also many opportunities for direct fraud. When a lottery ticket is sold the purchaser receives no commodity. *All that is sold* is the assurance that a numbered counterfoil, corresponding with the ticket sold, will be placed in a drum from which the winning number will be drawn by chance. It is clearly impossible that more than a few of the ticket holders in large lotteries can ever have any personal knowledge that the bargain has been fulfilled. It is inconceivable that large lotteries should be promoted except under strict supervision or in conformity with detailed regulations." (Emphasis ours.)

The Report of the Royal Commission, it is submitted, demonstrates that under the laws of England, which the Commission's brief states are comparable to Section 1304, the quiz-giveaway programs here involved are not lotteries.

2. *The Nature Of Lotteries: Historically The Term Lottery Has Meant A Form Of Wager Involving The Payment Of Money Or Thing Of Like Value In Consideration For A Chance To Win A Prize. From The First It Has Been So Understood And Congress, Without Expressly So Stating, Has Indicated That It So Regards It.*

(a) In the earliest known lottery, authorized in 1566, there were prize, chance and consideration in that chances to win numerous prizes, the largest of which was five thousand pounds sterling, were sold for "the summe of tenne shillings sterling". See, *Ashton, A History of English Lotteries* (1893), pp. 5-16. From and after that date,

lotteries in England continued to have those elements. See, *Ashton*, op. cit., *supra*.

Lotteries in American Colonial times and in the early days of the Republic continued to have these same characteristics of prize, chance and consideration in the form of money or like thing of value paid for the chance. See, *Spofford*, *Lotteries in American History*, pp. 173-195 of *American Historical Association Report for 1892*. Indeed, many states of the new Republic authorized lotteries in order to raise funds for public purposes. These State sponsored lotteries, of course, contained the standard elements in that the public paid money for tickets which gave the purchasers a chance to win a large prize. See, *Spofford*, op. cit., *supra*, *passim*; cf., Report of the Committee of the House of Representatives of Pennsylvania on Lotteries (1832); *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264; *Phalen v. Virginia*, 49 U. S. (8 How.) 163.

The evil of lotteries—that they induced improvident expenditures of money and like things of value by the public, particularly by those who could least afford to gamble—became evident at an early date. See, *Tyson*, *A Brief Survey Of The Great Extent And Evil Tendencies Of The Lottery System As Existing In The United States* (1833), which shows that in many instances individuals were driven to ruin and impoverishment by their expenditures of their moneys on lotteries.

(b) In the light of this background, there was no need for Congress to define what it meant by the term "lottery", when in 1827, for the first time, it restricted the use of the mails thereby (4 Stat. 238). It did not state that a lottery consisted of prize, chance and payment of

money for the chance because the nature thereof was well understood. Congress, in 1827, thus merely provided:

*"Sec. 6, And be it further enacted, That no postmaster, or assistant postmaster, shall act as agent for lottery offices, or, under any colour of purchase, or otherwise, vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets."**

It is significant, however, that Congress prohibited postmasters "under any colour of purchase, or otherwise" from vending lottery tickets. It, thereby, clearly indicated in this first lottery statute that it had in mind the payment of money for the purchase of chances to win prizes.

In the lottery laws enacted since 1827, Congress has not seen fit to define what constitutes a lottery in terms of prize, chance or consideration. However, it has continued to indicate in some of those laws that it regards lotteries as schemes whereby the public is induced to part with money or property. Thus, in the Postal Laws, Congress has treated lotteries as a species of schemes whereby "*money or property*" is obtained by false or fraudulent pretenses.** In those laws, Congress has linked lotteries with "any other scheme for obtaining money or property

* This language has survived in substantially the same form down to date. See Section 1303 of the Criminal Code (18 U. S. C. 1303).

** It should be noted that the Report of the Royal Commission of 1934, quoted above at pages 20-21, showed that it considered lotteries as devices whereunder moneys or properties were obtained fraudulently from the public which purchased chances to win a prize because it was misled as to mathematical probabilities of success.

of any kind through the mails by means of false and fraudulent pretenses". See 39 U. S. C. 259 and 732.

Committees of Congress from time to time have indicated that the reason lotteries are made illegal is that they are a form of gambling which results frequently in disaster to the public and against which the public should be protected. For example, in 1890 several committees of Congress reviewed the extent to which the mails should be closed to lotteries. After their consideration of the question, those committees rendered reports to Congress which contained the following statement:

"It is not the object of this report to debate the question as to whether the lottery companies are inimical to public morals or of immoral tendency. The day is passed for such discussion. It is admitted, or probably not seriously denied that the existence of such *swindling schemes* is promotive of the *spirit of gambling and results in serious disaster to many citizens*. That Congress is willing to provide any remedy for the correction of these evils, within the letter and spirit of the Constitution, will be treated herein as an accepted fact" (Emphasis ours)

So also, when Congress enacted Section 1305 of the Criminal Code (18 U. S. C. 1305), exempting fishing contests from the lottery laws, the report of the Committee of the House of Representatives which drafted the legislation stated, as the reason for the exemption, that fishing contests were not the type of "reprehensible gambling

* H. R. Rep. No. 2844 p. 4, 51st Cong. 1st Sess. (1890). See also, S. Rep. No. 1579, 51st Cong. 1st Sess. (1890).

activity which Congress had in mind to forbid in the lottery laws".*

Gambling is a staking of money or like thing of value on the outcome of a contest, game, event or the like. As stated in *Washington Coin Machine Association v. Callahan*, 142 F. 2d 97 at p. 98 (C. A. D. C.):

"To gamble, as is well known, is to risk one's *money or other property* upon an event, chance or contingency in the hope of realization of gain . . ." (Emphasis ours)

The element of risking of money or property as consideration for being granted the chance to realize gain is entirely lacking in the case at bar.

3. *The Cases Demonstrate That The Commission's Definition of Consideration Is Incorrect.*

(a) As stated in Pickett, *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1205:

"The theory behind the lottery laws is that people should be protected from dissipating their *money* by gambling against odds which are not usually fully appreciated." (Emphasis ours)

The cases, almost universally, have recognized this to be the theory of the lottery laws.

In *Phalen v. Virginia*, 49 U. S. (8 How.) 163 at 167-8, this Court stated:

"The suppression of nuisances injurious to public health or morality is among the most important

* See the U. S. Code Cong. Serv., 1950 Vol. 2 p. 3010 for the Legislative History of Section 1305.

duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; *it preys upon the hard earnings of the poor; it plunders the ignorant and simple.*" (Emphasis ours)

This same statement has been repeated by this Court in numerous subsequent cases. See, *Stone v. Mississippi*, 101 U. S. 814 at 818; *Douglas v. Kentucky*, 168 U. S. 488 at 496; *The Lottery Case*, 188 U. S. 321 at 356; *cf.*, *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342.

Implicit in these statements is the understanding of this Court that lotteries involve the expenditure by the public of money or like thing of value in consideration for the chance to win a prize. How else could lotteries prey upon the hard earnings of the poor and plunder the ignorant and simple?

In *The Lottery Case*, 188 U. S. 321, this Court sustained the power of Congress to prohibit lotteries in interstate commerce because of the "evils that inhere in the raising of money, in that mode". 188 U. S. at 356.

(b) Every judicial decision, which research has disclosed, interpreting any federal lottery statute holds that where there is no direct or indirect payment of money or something of like value on the part of some member of the public, there is no lottery. See, e.g., *Post Publishing Company v. Murray*, 230 Fed. 773 (C. A. 1), cert. denied, 241

U. S. 675; *Garden City Chamber of Commerce v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2); 104 F. Supp. 235 (E. D. N. Y.); *Peck v. United States*, 61 F. 2d 973 (C. A. 5); *Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Co.*, 23 F. Supp. 3 (N. D. Ill.); *United States v. Hughes*, 53 F. 2d 387 (S. D. Tex.).

In the *Post Publishing Company* case, a newspaper advertised that it would publish headless photographs of fifty women shoppers, taken at random by its photographer, and that it would pay \$5 to each woman who came to the newspaper office and identified her picture. The postmaster barred the newspaper from the mails, on the ground that the scheme violated the postal lottery law. The newspaper sued to be relieved of the order. In finding for plaintiff, the court held that the newspaper's plan did not "present the kind of lot or chance which the Act of Congress was striking against, because the particular kind of chance involved * * * did not require a parting with anything by members of the public for the prize offered."

In the recent *Garden City* case, *supra*, a plaintiff sued to enjoin a local postmaster from refusing to transmit in the mails, cards used to promote a scheme which the court described as follows (100 F. Supp. at p. 770):

"(a) Each recipient of a card detaches therefrom a removable coupon bearing the same printed number as does the card itself. The sender retains the coupon, and (b) after mailing the card to the Chamber of Commerce, he (c) looks into the shop windows of the storekeepers who participate in the plan. (d) If he sees his number attached to an article displayed in one of those windows, he enters the store, presents his coupon, and receives that article."

The action of the postmaster was defended on the ground that the scheme was a lottery.

The Court, however, held that the scheme was not a lottery. It found lacking an essential element of a lottery—the risking of a sum of money or thing of value for the chance of gaining something of greater value than that which was surrendered. The Court thus stated (100 F. Supp. p. 772):

“The examination of authorities made in the present case induces the belief that the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed. I have found no case in which the element of consideration has resided in walking or driving to look in a window, which is manifestly not a contribution to the merchandise which is distributed; the value, if any, of the physical exercise cannot be compared to the value of the prize. If this were not so, the ruling would still be arbitrary and capricious, in that no factual data are employed to support a finding that the average participant would be required to put forth a ‘substantial’ effort, whatever that means.

“In the view of this Court, the Solicitor (of the Post Office Department) has ruled that to be a consideration, which by no common-sense process of reasoning can be so designated; no authority has been cited, nor discovered by independent effort, which vindicates the position taken for the defendant. While the use of the mails must be under governmental supervision, it is also to be remembered that the taxpayers, who shoulder a huge annual deficit from the operations of the Post Office, have a right to their day in court to contest that which imposes a strained and unnatural construction upon a word

having a commonly accepted meaning.” (Words in parentheses ours)

The Court of Appeals for the Second Circuit denied an application for a stay in the *Garden City* case for the reasons stated in the above quoted opinion of the district court. See 192 F. 2d 240.

Garden City and *Post Publishing* show that the Commission's concept of consideration is in error. If leaving home to visit a newspaper office or show windows of stores does not constitute the consideration required by the lottery statutes, then *a fortiori* remaining at home to listen to the radio or to view television does not constitute such consideration.

The state court decisions are to the same effect. See, e.g., *Commonwealth v. Wall*, 295 Mass. 70, 3 N. E. 2d 28; *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689; *State ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929; *State v. Big Chief Corp.*, 64 R. I. 448, 13 A. 2d 236; *People v. Burns*, 304 N. Y. 380, 107 N. E. 2d 498; *People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, aff'd. 273 N. Y. 475, 6 N. E. 2d 410; *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Tex. Civ. App.); *People v. Cardas*, 137 Cal. App. 788, 28 P. 2d 99.

(c) The Commission in its brief in this Court has not cited, and it cannot cite, a single federal case in which a lottery, gift enterprise or similar scheme was found to exist even though no member of the public was induced to pay money or a thing of like value in consideration for the chance to win a prize.

So also, of the numerous state court decisions holding schemes to be lotteries cited by the Commission, all (except

for a handful regarded as sports*) involved situations in which some members of the public paid money or like thing of value as consideration for the chance to win a prize. In many of those cases, the members of the public may also have received merchandise or some like thing in return for the money paid by them; but in every such instance an inducing factor for the expenditure of money was the chance to win a prize.**

Illustrative of cases relied on by the Commission in its brief are *Horner v. United States*, 147 U. S. 449; *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579 (C. C. E. D. N. Y.); and the Bank Night cases.†

In *Horner v. United States*, 147 U. S. 449, the question was whether a scheme involving bonds issued by the Empire of Austria constituted a lottery. Each bond was payable at the end of 55 years from 1864, unless earlier

* See, e.g., *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242, and *State ex. rel. Regez v. Blumer*, 236 Wis. 129, 294 N. W. 491. The *Maughs* case has been criticized in the following authorities: in 80 U. of Pa. L. Rev. 744, 18 Va. L. Rev. 465; *State v. Big Chief Corp.*, 64 R. I. 448, 13 A. (2d) 236; *State ex. rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929 and *People v. Shafer*, 160 Misc. 174, 289 N. Y. Supp. 649, aff'd. 273 N. Y. 475, 6 N. E. 2d 410.

** The cases involving such situations are exceedingly numerous. No useful purpose would be served in trying to cite them. Most of them are referred to or cited in 48 A. L. R. 1115; 57 A. L. R. 424; 101 A. L. R. 1126; 103 A. L. R. 866; 109 A. L. R. 709; 113 A. L. R. 1121; 120 A. L. R. 412.

† The Commission in its Report relied only on the *Horner* and *Brooklyn Daily Eagle* cases as supporting the theory of consideration enunciated in the Rules. It is submitted that the Rules must fall because those cases do not sustain them.

redeemed. A certain number of bonds, determined by lot, were to be redeemed each year after the date of issuance. Each bond, on redemption, was to receive the principal amount thereof, plus a small sum as interest. In addition, however, certain bonds, selected by lot, were to be awarded special prizes on their redemption, i.e., the amount paid on their redemption would be far in excess of their face value.

The public thus was asked to purchase the bonds not on their merits as an investment, but on the basis of gambling for a large return. It was evident that many people were induced to make an improvident expenditure of moneys and to tie up funds which they might well have needed for other purposes, and indeed for the necessities of life, because they were *assured of a chance* to win a large prize. As this Court noted (147 U. S. at 459), the plan was "an appeal to the cupidity of those who had money".

All the evils at which the lottery laws were directed in order to protect the public (see pp. 20, 22-26, *supra*) were present in the *Horner* case and this Court therefore ruled that the bonds constituted lotteries.*

*Purchasers of the bonds, in theory, could not "lose" money because they would at least receive back the principal of their investment plus interest. However, this assurance was only theoretical—the Empire of Austria might (and did) become insolvent and extinct before the maturity of the bonds—55 years from 1864—the date of the issuance thereof. Purchasers thus were induced to tie up their funds for 55 years in this so-called investment—which proved improvident because the Empire of Austria became disabled from paying before the end of 55 years from 1864—by the chance to obtain a large prize.

The *Horner* case is not pertinent here. In this case, no member of the public is induced to make any outlay of money. No member of the public makes an improvident expenditure of his substance in return for a chance to compete for a prize. In short, the evil which the lottery laws were intended to eradicate is not here present.

Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579 (C. C. E. D. N. Y.), likewise does not support the Commission's tests of consideration involved on this appeal. The scheme there involved was one wherein all members of the public were promised a chance to compete in an essay contest if they accompanied their essays with three labels cut from containers of a specified breakfast food. Some members of the public would purchase the breakfast food so as to get the labels. In other words, some members of the public would expend moneys for a breakfast food which they would not otherwise buy in order to obtain a chance to compete.

On the basis of these facts, the district judge held the scheme to be a lottery, saying (at p. 582):

"The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement."

It is clear from the opinion that the district judge found consideration present because people were paying money to enter the competition, although they were doing so indirectly. The court referred to the fact (181 Fed. at p. 582) that sales of the product would be based upon "a desire to get something for nothing".

The Commission, however, apparently relies on one sentence in the *Brooklyn Daily Eagle* opinion, to wit:

“It is only necessary that the person entering the competition shall do something or give up some right.”

as supporting its definition of consideration. This sentence cannot be read out of context. The Court in the *Brooklyn Daily Eagle* case was referring to a situation in which the public was induced to stake money indirectly in return for the chance of winning a large prize.

Affiliated Enterprises v. Gantz, 86 F. 2d 597 (C. A. 10) is illustrative of the cases involving the typical Bank Night situation. Under the scheme there involved, a theatre or other place of amusement maintained a registration book in its lobby. Any person could enter the lobby without charge and register his name in the book whereupon he would be assigned a number. All the numbers of the registrants were placed in a receptacle and, at a time and place designated in advance, one number was drawn therefrom. The name of the person holding the number was announced from the stage and in the lobby of the theatre. If that person presented himself on the stage within a short time, he was awarded a large prize. If the holder was not inside the theatre but in the lobby outside, he was permitted to enter free of charge for the purpose of collecting his prize. If no one appeared to claim the prize, the amount of the prize for that week was added to the prize for the following week.

The Court in the *Gantz* case emphasized the fact that, although theoretically everyone could compete without pay-

ing admission to the theatre, in practice many would go to the theatre and pay their admission price only because they would thereby obtain a chance to win a prize. The Court found that consideration was present because some members of the public, even though not all, were induced to pay money in order to obtain a chance to win a prize. It thus stated (at page 599):

“It is further apparent that when non-paying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent *one who paid to get in only because of his interest in the drawing.* Indeed, that is more than probable. Then how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift.” (Emphasis ours)

It is submitted that regardless of the language used by the courts, a factual situation (involving the payment of money or like thing by some member of the public) similar to that present in the *Horner*, *Brooklyn Daily Eagle* and *Gantz* cases will be found in every case (except the handful of sports adverted to above, all of which are state court cases) in which consideration was held to be present and in which a lottery or similar scheme was found to exist.

(d) The only court—a state court—which has specifically considered the legality of a quiz-giveaway program of the type here proscribed by the Commission ruled that it did not constitute a lottery.

Clef, Inc. v. Peoria Broadcasting Co., decided in November, 1939, in the Circuit Court of Peoria County, Tenth Judicial District, State of Illinois, passed on and upheld

the legality of a quiz-giveaway program known as Mu\$ico (R. 283, 16-23).

4. *The Commission's Rules Are Inconsistent With Rulings Issued By The Agencies Of The United States Directly Charged With The Enforcement Of The Lottery Laws.*

The Commission is not directly charged with the enforcement of Section 1304. The Rules here are not in a field in which the Commission has expert knowledge. As a consequence, the Commission's views are not authoritative and, as above noted, if they run *contra* to the decided cases, they are invalid.

The enforcement of Section 1304 is primarily the function of the Department of Justice. The enforcement of other and comparable lottery laws is vested in the Department of Justice and in the Post Office Department.*

The Post Office Department has issued rulings that programs similar to those of CBS described above do not violate the lottery laws and the Department of Justice has refused to prosecute them. See pp. 6 to 7 *supra*.

It is, furthermore, a fact of the utmost significance in this case that the United States, though a defendant in this action, has not joined in the Commission's appeal. For this is not simply a case in which the failure of the Department of Justice to join in the appeal of an administrative agency may connote only doubts as to the importance of the question presented or skepticism as to the correctness of the

* See Sections 1301, 1302, 1303 and 1305 of the Criminal Code (18 U. S. C. 1301, 1302, 1303 and 1305) and Sections 259 and 732 of the Postal Laws (39 U. S. C. 259, 732).

agency's factual findings. This is a case in which the Commission's appeal raises a bare legal question with respect to a federal criminal statute whose implementation and enforcement is the primary responsibility of the Department of Justice.

The failure of the United States to join with the Commission on this appeal can only mean that, upon full consideration, the Solicitor General has concluded that the Department should adhere to its long-standing view (see *supra* p. 6), that these programs do not violate the lottery laws.

Finally, it is to be noted that the Commission, prior to the enactment of the Rules, itself in effect conceded that programs similar to those here involved were not illegal. This appears from a letter written by the then Chairman of the Commission to Senator Wheeler, Chairman of the Senate Interstate Commerce Committee on December 30, 1943. In his letter, Chairman Fly pointed out that the existing law did not enable the Commission to deal with such programs and submitted a proposed draft of new legislation to bar them (R. 27-28). The suggested legislation was not adopted (R. 283).

We submit that the proper approach here is that taken by this Court in *Hannegan v. Esquire, Inc.*, 327 U. S. 146. In that case, this Court said (327 U. S. at 156, 157-158):

"The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. * * * Under our system

of Government there is an accommodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * What seems to one to be trash may have for others fleeting or even enduring values. * * *

It is especially important here that the statute be strictly construed because it is penal in nature. See *United States v. Halseth*, 342 U. S. 277, 280; *France v. United States*, 164 U. S. 676, 682.

5. *If Section 1304 Of The Criminal Code Is Construed To Make Programs Of The Type Here Involved Illegal, It Is Unconstitutional In That It Deprives CBS Of Its Property Without Due Process Of Law In Violation Of The Fifth Amendment To The Constitution. It Should Not Be Given Such A Construction Which Will Raise Grave Doubts As To Its Constitutionality.*

(a) CBS is, of course, engaged in interstate commerce (R. 246). See, *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 655.

Congressional prohibition and punishment of activities in interstate commerce is valid only if such action is necessary to protect the public against harm or evil. See, *Brooks v. United States*, 267 U. S. 432, 436; *Carolene Products Co. v. United States*, 323 U. S. 18, 27-28.

On the other hand, legislative interference with business activities is arbitrary and violative of due process of law where such interference is not necessary to protect the public against harm or evil. See, *Weaver v. Palmer Bros.*

Co., 270 U. S. 402, in which state legislation interfering with business was held arbitrary and violative of the due process provisions of the Fourteenth Amendment. And this Court has ruled that Congress' powers over interstate commerce are subject to the same limitations under the Fifth Amendment as are the powers of state legislatures over intrastate commerce under the Fourteenth Amendment. Compare, *Carolene Products Co. v. United States*, 323 U. S. 18, with *Sage Stores Co. v. Kansas*, 323 U. S. 32.

Federal lottery laws, such as Section 1304 of the Criminal Code, are constitutional because the schemes at which they are directed are evil and tend to demoralize the public. See, e.g., *The Lottery Case*, 188 U. S. 321. However, the programs here involved have not been found to have any evil or demoralizing effect on the public (R. 249). On the contrary, the Commission here has admitted that (R. 5, 1 and 244):

“Such programs have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public.”

It is therefore submitted that Section 1304, if it be given the construction set forth in the Commission's Rules, violates the Constitution.

(b) To say the least, the Commission's construction of Section 1304 gives rise to grave constitutional questions, whereas the construction urged by CBS does not. Under these circumstances, the construction urged by CBS should be adopted. As stated by this Court in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407-408:

“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably

susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless his rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Comm.*, 211 U. S. 407."

To the same effect, see *United States v. C. I. O.*, 335 U. S. 106, 120.

This Court, it is respectfully submitted, should construe Section 1304 as urged by CBS. It will thereby avoid the grave constitutional questions outlined above.

6. *The Commission's Other Contentions Are Unsound.*

(a) The Commissioner's brief (e.g., pp. 15, 19, 64) suggests that the validity of the Commission's Rules is to be determined not only by whether they correctly set forth the elements of a "lottery", but also by whether they correctly set forth activity which Section 1304 of the Criminal Code proscribes as a "gift enterprise" or "similar scheme".

At the outset, it should be noted that the Commission has not raised any such issue on its appeal herein. In its statement of jurisdiction in this Court and in its brief (p. 2)

herein, it stated that the question presented on this appeal is:

“whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of *lottery consideration* in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.” (Emphasis ours)

The Commission's Report, furthermore, makes it clear, as noted above at p. 11, that the Rules were intended only to define what constitutes a “lottery”, and not a “gift enterprise” or “similar scheme”, within the proscription of Section 1304.

Securities & Exchange Commission v. Chenery, 318 U. S. 80, 87, demonstrates that the validity of the Commission's Rules must be determined solely on the basis set forth in its Report.

This Court should not, in the first instance, determine whether the programs here involved violate Section 1304 on the grounds that they constitute a “gift enterprise or similar scheme” and whether they should be kept off the air for that reason. That determination is one which, in the first instance, should be made by the Commission. There has been no such determination yet.

Moreover, there is no indication in the cases that a “gift enterprise or similar scheme” does not require consideration. For example, in *Horner v. United States*, 147 U. S. 449, the issue before this Court was whether the Austrian scheme for selling bonds violated a statute which forbade the use of the mails to lotteries, gift concerts and similar schemes. This Court drew no distinction between lotteries, gift concerts and similar schemes from the viewpoint of

whether consideration was required. It did not even so much as intimate that consideration was required for lotteries but not for gift concerts or similar schemes. Indeed, it is inconceivable that that opinion would have been written as it was, if consideration was not required for gift concerts or similar schemes.

The fact is that "gift enterprises" involve a payment of a money consideration in the form of a purchase of an article, the purchase being induced in part by the lure of a chance to win a prize. See *Matter of Gregory*, 219 U. S. 210; 54 C. J. S. 850.

That "similar schemes" also involve the payment of a monetary consideration, see 23 Ops. Atty. Gen. 203 (1901).

In any event, since the programs here involved are not harmful to the public, it is submitted that Section 1304 would be unconstitutional if it were deemed to make them invalid as gift enterprises or similar schemes.

(b) The Commission's brief (pp. 31-32, 47) urges that the vice of lotteries lies in their promotion of a "gambling spirit" or "spirit of speculation" among participants.

Unless there is some financial expenditure by a participant in consideration for a chance to win a prize, it is meaningless to say that a program or scheme invokes a "gambling spirit" or "spirit of speculation". For example, if a wealthy person were to announce that, on a particular date and time, at a specified location, he would award prizes to individuals selected by chance, there would exist, among those who attended, what the Commission's brief (p. 47) describes as the "gambling spirit—the lure of obtaining something for nothing or almost nothing".

Yet it is clear that such a gratuitous distribution of prizes by chance is not illegal.

The Commission uses the words "gambling spirit" and "spirit of speculation" in a way which begs the question.

As stated in *O'Brien v. Scott*, 20 N. J. Super. 132, 89 A. 2d 280 at 282-3:

"It begs the question, by making the test 'designed to and does appeal to * * * the gambling instinct' without defining 'gambling'. Thus we are again relegated to an ascertainment of the meaning of the basic word 'gambling'."

The word "gambling" connotes the staking of money or like thing of value on the outcome of a contest, game, event or the like. See, *Washington Coin Machine Ass'n. v. Callahan*, 142 F. 2d 97 (C. A. D. C.) quoted *supra* p. 25.

The element of risking of money or property in the hope of realization of gain is entirely lacking in the case at bar. There is, therefore, no "gambling" here and it cannot be said that the programs result in the promotion of the "gambling spirit" or "spirit of speculation" as those words are properly used.

(c) The Commission's brief (pp. 48, 25) indicates that members of the radio or television audience listening to or viewing quiz-giveaway programs are induced by the sponsor's advertising to purchase products or services, and that such purchases constitute consideration for the purposes of the lottery statutes.

This argument lacks merit. The authorities which we have cited above make it clear that consideration (whether it be money or like thing of value) is that which is paid or

staked by a member of the public and in return for which he receives the *right* to a chance to win a large award.

In the quiz-giveaway programs of CBS, no member of the public is told that if he purchases the sponsor's product, he will thereby obtain the right to compete on the program. No one who purchases a product thereby obtains a chance to compete for or win a prize.

Indeed, the Commission's contention breaks down completely in connection with sustaining programs. No one listening to sustaining programs is induced to purchase anything because sustaining programs are not sponsored. No product or service is advertised on such programs. Yet the Rules do not distinguish between sustaining and sponsored programs.

(d) The Commission's view and that of the dissenting Judge below basically is that any scheme which involves the distribution of prizes by chance and which benefits the sponsor thereof is a lottery. See Commission's brief, pages 16, 21.

This view is in error because benefit to the persons who sponsor or create games or contests challenged as lotteries is not the test of consideration under the cases.

Presumably in the *Garden City* and *Post Publishing Co.* cases, the sponsors of the schemes there involved were benefitted by the number of persons who participated therein; yet consideration was not found to exist. The cases do not apply any such test. Cf. e.g., *Affiliated Enterprises Inc. v. Rock-Ola Mfg. Co.*, 23 F. Supp. 3 (N. D. Ill.); *People v. Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99; *Griffith Amusement Co. v. Morgan*, 98 S. W. 2d 844 (Tex. Civ. App.).

What is important, under the cases, is the impact upon the public of the game or contest involved.

The lottery laws have been upheld as valid exercise of the police power *only* because lotteries are harmful to the public. See, *Phalen v. Virginia, The Lottery Case* and the other cases cited above at page 26. In none of them was there any attempt to justify the lottery laws on the ground that it was important to keep promoters from making profits.

(e) The Commission's brief (pp. 55, *et seq.*) attempts to distinguish some of the cases cited by the majority of the Court below on the ground that they involved state statutes which in terms required a valuable consideration or a monetary payment. It also (brief, p. 59) criticizes other cases on the ground that they uncritically followed the former cases.

What the Commission fails to observe is that the precise language of the statutes is not important. The fact that the cases fail to base distinctions on the precise language of the statutes demonstrates that they recognize that all the statutes are directed at the same thing—lotteries and like schemes. It demonstrates that the cases recognize that the statutes which contain the words “valuable consideration”, are not directed at a more narrow type of scheme or program than those which do not use those words. The cases have not made any play on words.

(f) The Commission's brief suggests (p. 63) that the doctrine of strict construction of criminal statutes is not relevant “where, as here, the statute is not being invoked with criminal sanctions in view”. This suggestion overlooks the fact that the construction of Section 1304 by this Court in this case will apply in prosecutions by the Department of Justice. Section 1304 cannot be construed one

way for the Commission and another for the Department of Justice. It is therefore submitted that Section 1304 should be strictly construed. *United States v. Halseth*, 342 U. S. 277; *France v. United States*, 164 U. S. 676, 682.

CONCLUSION TO BRIEF

We urge that there is no warrant for extending the concept of "consideration" beyond the cases in order to convert what is essentially a matter of taste with respect to program content into a crime. The Attorney General has refused to do this, and the Congress has failed to act on the Commission's request for remedial legislation. Whether the programs here involved warrant criminal sanctions is a question which should be squarely faced and decided by Congress before those sanctions are allowed to attach. This Court, it is submitted, should not be the first to apply a lottery statute to a situation wholly different from those it was intended to reach.

The judgment of the District Court should be affirmed.

Respectfully submitted,

MAX FREUND,

Attorney for

Columbia Broadcasting System, Inc.

ROSENMAN GOLDMARK COLIN & KAYE,

RALPH F. COLIN,

JULIUS F. BRAUNER,

Of Counsel.

January 26, 1954.

SUPREME COURT OF THE UNITED STATES

Nos. 117, 118 AND 119.—OCTOBER TERM, 1953.

Federal Communications Commission, Appellant,

117 v.

American Broadcasting Company, Inc.

Federal Communications Commission, Appellant,

118 v.

National Broadcasting Company, Inc.

Federal Communications Commission, Appellant,

119 v.

Columbia Broadcasting System, Inc.]

On Appeal From
the United States
District Court for
the Southern Dis-
trict of New York.

[April 5, 1954.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases are before us on direct appeal from the decision of a three-judge District Court in the Southern District of New York, enjoining the Federal Communications Commission from enforcing certain provisions in its rules relating to the broadcasting of so-called "give-away" programs. The question presented is whether the enjoined provisions correctly interpret § 1304 of the United States Criminal Code, formerly § 316 of the Communications Act of 1934. This statute prohibits the broadcasting of ". . . any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance. . . ." ¹

¹ 18 U. S. C. § 1304 (derived from former § 316 of the Communications Act of 1934, 48 Stat. 1088-1089, repealed by 62 Stat. 862, 866):

"Whoever broadcasts by means of any radio station for which a

The appellees are national radio and television broadcasting companies. They are, in addition, the operators of radio and television stations licensed by the Commission. Each of the appellees broadcasts, over its own and affiliated stations, certain programs popularly known as "give-away" programs. Generally characteristic of this type of program is the distribution of prizes to home listeners, selected wholly or in part on the basis of chance, as an award for correctly solving a given problem or answering a question.²

license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

² Examples of the "give-away" programs involved here are "Stop the Music" (American Broadcasting Company), "What's My Name" (National Broadcasting Company), and "Sing It Again" (Columbia Broadcasting System).

"Stop the Music" is described in American's complaint in No. 117 as follows: The home contestants are called on the telephone during the program. On the radio version, home contestants are selected at random from telephone directories. On the television version, home contestants are selected by lot from among those listeners who express in advance, through postcards sent to the network, their desire to participate. On both the radio and television versions, however, the home contestant is not required to be listening to the broadcast at the time he is called in order to participate. When called, the home contestant is asked to give the title of a musical selection that has just been played. In the event he was not listening, or for some other reason desires to have the tune repeated, the master of ceremonies hums or sings it to him over the telephone. If he answers correctly, he receives a merchandise prize; if not, he gets a less valuable "consolation" prize and a member of the studio audience is then given an opportunity to win the merchandise prize by identify-

The rules challenged in this proceeding, §§ 3.192, 3.292, and 3.656 of the Commission's Rules and Regulations,

ing the same tune. If the home contestant answers correctly, he receives, in addition to the merchandise prize, an opportunity to identify another tune, called the "Mystery Melody." If he identifies this tune, he wins the "jackpot" prize, usually valued at several thousand dollars. Should he fail to identify the "Mystery Melody," another home contestant is called and the process is repeated. Additions to the "jackpot" prize are made each week so long as the "Mystery Melody" remains unidentified.

"What's My Name" is described in National's complaint in No. 118 as follows: Prizes are awarded to contestants for correctly identifying famous persons on the basis of clues given by the master of ceremonies and in a short skit performed by professional actors. All but one of the contestants on the program are chosen from members of the studio audience. The remaining contestant is chosen at random from postcards sent in by listeners, and is called on the telephone during the program. For answering the telephone, he is awarded a watchband manufactured by the sponsor of the program and is also given the opportunity to win a valuable "jackpot" prize in Government bonds by identifying the famous person described in the "jackpot" clues. If the home contestant fails to make a correct identification, the amount of the "jackpot" is added to the "jackpot" for the following week's program. The subject of the "jackpot" clues, however, is changed every week.

"Sing It Again" is described in Columbia's complaint in No. 119 as follows: Performers sing a popular song and then repeat it but this time with parody lyrics describing some person, place, or event. Contestants, selected at random from telephone directories, are called by long distance telephone during the program. If the contestant correctly identifies the subject described by the parody lyrics, he wins a merchandise prize and an opportunity to win a "jackpot" prize by identifying the "Phantom Voice," the voice of a famous but unrevealed person. Clues as to the identity of the "Phantom Voice" are given on the program and on other programs broadcast over the same network. The "jackpot" is increased week by week until the correct identification is made. If the home contestant fails to identify the subject of the parody lyrics, he receives a "consolation prize," and a member of the studio audience is given the opportunity to answer and win the merchandise prize.

4 F. C. C. v. AMERICAN BROADCASTING CO.

were designed to prevent the broadcast of such programs.³ The rules are identically worded and apply, respectively, to standard radio broadcasting (AM), FM radio broadcasting, and television broadcasting. Paragraph (a) of each rule provides that "An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting . . .," programs of a sort forbidden by § 1304. Paragraph (b) provides that a program will fall within the ban

" . . . if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

"(1) Such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) Such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) Such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the sta-

³ 47 CFR, 1952 Cum. Supp., §§ 3.192, 3.292, 3.656. The language of the rules is broad enough to cover contest programs drawing contestants solely from members of the studio audience. In the court below, however, the Commission took the position that such coverage was not intended, and the controversy was delimited to programs involving the distribution of prizes to contestants participating from their homes. 110 F. Supp. 374, 381.

tion in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) Such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

After promulgation of the rules, the present actions were brought by the appellees.⁴ The District Court sustained the Commission's general authority to adopt such rules, and sustained subdivision (1) of paragraph (b) as a correct interpretation of § 1304. But, with one dissent, the court held that subdivisions (2), (3), and (4) were beyond the scope of § 1304 and hence invalid. The court was of the view that § 1304 applied only to contest programs requiring contestants to contribute a "price" or "thing of value."⁵ We noted probable jurisdiction and consolidated the cases for argument.⁶

⁴ The actions were brought under § 402 (a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402 (a); 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325; and § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009. Pub. L. No. 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. § 1031, has since changed the procedure under § 402 (a), but is inapplicable to actions commenced prior to its enactment.

⁵ 110 F. Supp. 374.

⁶ 346 U. S. 808.

6 F. C. C. v. AMERICAN BROADCASTING CO.

Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either by general rule or by individual decisions.⁷ But the Commission's power in this respect is limited by the scope of the statute. Unless the "give-away" programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action. Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a "lottery, gift enterprise, or similar scheme" proscribed by § 1304.

⁷ The Commission is authorized by § 4 (i) of the Communications Act to "make such rules and regulations, and issue such orders, as may be necessary in the executions of its functions"; by § 303 (r) to "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"; by § 307 (a) and § 309 (a) to grant station licenses and license renewals "if public convenience, interest, or necessity" would thereby be served; by § 312 (a) to revoke a license for a violation of any regulation authorized by the Act. 48 Stat. 1068, 47 U. S. C. § 154 (i); 50 Stat. 191, 47 U. S. C. § 303 (r); 48 Stat. 1083, 47 U. S. C. § 307 (a); 48 Stat. 1085, 47 U. S. C. § 309 (a); 48 Stat. 1086-1087, 47 U. S. C. § 312 (a). The "public interest, convenience, or necessity" standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant's past or proposed violation of a federal criminal statute especially designed to bar certain conduct by operators of radio and television stations. And if this consideration is a proper one in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity. See *National Broadcasting Co. v. United States*, 319 U. S. 190, 222-224; cf. *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 46-47.

All the parties agree that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for a consideration.⁸ They also agree that prizes on the programs under review are distributed according to chance, but they fall out on the question of whether the home contestant furnishes the necessary consideration.

The Commission contends that there is such consideration; in its brief, it urges that these programs

"... are nothing but age old lotteries in a slightly new form. The new form results from the fact that the schemes here are illicit appendages to legitimate advertising. The classic lottery looked to advance cash payments by the participants as the source of profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising."

It contends that consideration in the form of money or a thing of value is not essential, and that a commercial benefit to the promoter satisfies the consideration requirement:

"... Where a scheme of chance is successfully designed to reap profits for its promoter, there will ultimately be consideration flowing from the participants, and it is of no consequence whether such consideration be direct or indirect. In either event,

⁸ A typical "lottery" is a scheme in which tickets are sold and prizes are awarded among the ticketholders by lot. See *Stone v. Mississippi*, 101 U. S. 814. A typical "gift enterprise" differs from this in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a "free" chance in a drawing. See *Horner v. United States*, 147 U. S. 449. But whatever may be the factual differences between a "lottery," a "gift enterprise," and a "similar scheme," the traditional tests of chance, prize, and consideration are applicable to each. We are aware of no decision, federal or state, which has distinguished among them on the basis of their legal elements.

the gambling spirit—the lure of obtaining something for nothing or almost nothing—is exploited for the benefit of the promoter of the scheme.”

As against this claim the appellees insist that something more is required than just a benefit to the promoter; that the participation of the home audience by merely listening to a broadcast does not constitute the necessary consideration.

Section 1304 itself does not define the type of consideration needed for a “lottery, gift enterprise, or similar scheme.” Nor do the postal lottery statutes from which this language was taken.⁹ The legislative history of § 1304 and the postal statutes is similarly unilluminating.¹⁰

⁹ Section 1304 is one of five sections—§ 1301 through § 1305—which constitute “Chapter 61—Lotteries” of Title 18. Section 1305, added in 1950, exempts certain “fishing contests” from the operation of the other four sections. Section 1301 prohibits the imperting or transporting of lottery tickets; § 1302, the mailing of lottery tickets and related matter; § 1303, the participation in lottery schemes by postmasters and postal employees; and § 1304, the broadcasting of lottery information. These four sections use the same terminology—“any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance.” This language first appeared in the 1909 amendments to the federal lottery laws. 35 Stat. 1129, 1130, 1136. It was adopted verbatim in § 316 of the Communications Act of 1934, which was the first federal statute to ban the broadcasting of lotteries. With only slight modifications not material here, § 316 became § 1304 of the Criminal Code in the 1948 revision of Title 18.

For the early history of lotteries in this country, see Spofford, *Lotteries in American History*, at p. 171 of 1892 Report of American Historical Association, S. Misc. Doc. No. 57, 52d Cong., 2d Sess.

¹⁰ See S. Rep. No. 1620, 80th Cong., 2d Sess. (1948); H. R. Rep. No. 304, 80th Cong., 1st Sess., p. A99 (1947); S. Rep. No. 781, 73d Cong., 2d Sess., p. 8 (1934); H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934); H. R. Rep. No. 1918, 73d Cong., 2d Sess., p. 49 (1934); S. Rep. No. 564, 72d Cong., 1st Sess., p. 10 (1932); H. R. Rep. No. 221, 72d Cong., 1st Sess., p. 8 (1932); S. Rep. No. 10, Part 1, 60th Cong., 1st Sess., p. 23 (1909); H. R. Rep. No. 2, Part 1, 60th Cong., 1st Sess., p. 22 (1909).

For guidance, therefore, we must look primarily to American decisions, both judicial and administrative, construing comparable antilottery legislation.

Enforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.

And so it is here. We find no decisions precisely in point on the facts of the cases before us. The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement.¹¹ Some courts—with vigorous protest from others—have held that the requirement is satisfied by a “raffle” scheme giving free chances

¹¹ In the only previous case on the legality of a “give-away” program of the type involved here, a state trial court held that the program did not constitute a lottery because the consideration element was lacking. *Clef, Inc. v. Peoria Broadcasting Co.*, Equity No. 21368, Circuit Court of Peoria County, Illinois (1939).

Similarly, cases under the postal lottery laws (see note 9, *supra*) appear to be uniform in requiring a “valuable” consideration for a “lottery, gift enterprise, or similar scheme.” See *Garden City Chamber of Commerce, Inc., et al. v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.); *Post Publishing Co. v. Murray*, 230 F. 773 (C. A. 1st Cir.), cert. denied, 241 U. S. 675. But cf. dictum in *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579, 581-582 (C. C. E. D. N. Y.).

10 F. C. C. v. AMERICAN BROADCASTING CO.

to persons who go to a store to register in order to participate in the drawing of a prize,¹² and similarly by a "bank night" scheme giving free chances to persons who gather in front of a motion picture theatre in order to participate in a drawing held for the primary benefit of the paid patrons of the theatre.¹³ But such cases differ substantially from the cases before us. To be eligible for a prize on the "give-away" programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.¹⁴

We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. Particularly is this true when through the years the Post Office Department and the Department of Justice have consistently given the words "lottery, gift enterprise or similar schemes" a contrary administrative interpretation. Thus the Solicitor of the Post Office Department has repeatedly ruled that

¹² A leading case is *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242; see also *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N. W. 491. Contra, *Cross v. People*, 18 Colo. 321, 32 P. 821; cf. *Garden City Chamber of Commerce, Inc., et al. v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.). For critical commentary on the *Maughs* decision, *supra*, see Notes, 18 Va. L. Rev. 465 and 80 U. of Pa. L. Rev. 744; Pickett, *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1206.

¹³ *E. g.*, *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A. 2d 257; *Affiliated Enterprises, Inc. v. Gantz*, 86 F. 2d 597 (C. A. 10th Cir.). Contra, *e. g.*, *Darlington Theatres v. Coker*, 190 S. C. 282, 2 S. E. 2d 782; *Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.).

¹⁴ Some of the programs involved here (*e. g.*, "Stop the Music," described in note 2, *supra*) do not even make this requirement. As a practical matter, however, few home contestants on a "give-away" program would be in a position to answer correctly the questions asked of them unless they listened to the program.

the postal lottery laws do not preclude the mailing of circulars advertising the type of "give-away" program here under attack.¹⁵ Similarly, the Attorney General—charged directly with the enforcement of federal criminal laws—has refused to bring criminal action against broadcasters of such programs.¹⁶ And in this very action, it

¹⁵ In 1949 the Solicitor ruled that material relating to "Stop the Music" (described in note 2, *supra*) would be mailable. In 1950 he ruled that material relating to a comparable contest conducted on the program "Truth or Consequences" would be mailable. While earlier rulings on a "give-away" program called "Mu\$ico" had been to the contrary, the Solicitor in 1949 informally advised that the material relating to the program would be mailable. These unreported rulings were made part of the record below.

In accord with these rulings, the Solicitor in 1947 had instructed local postmasters that at least "an expenditure of substantial effort or time" was required in order to find an enterprise to be a "lottery, gift enterprise, or similar scheme." The instructions provided:

"In order for a prize scheme to be held in violation of this section, it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchases of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. *On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present.*"

(Italics added.) Postal Bulletin, Feb. 13, 1947. The italicized language, *supra*, was judicially confirmed in *Garden City Chamber of Commerce, Inc., et al. v. Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2d Cir.). In 1953, on the basis of the *Garden City* case and the District Court decision in this case, the Solicitor issued new instructions further narrowing the meaning of "an expenditure of substantial effort or time." Postal Bulletin, June 4, 1953.

¹⁶ Apparently no prosecutions have ever been instituted under either the former § 316 of the Communications Act or the present § 1304 of the Criminal Code. In a series of letters made part of the record below, the Chairman of the Commission in 1940 urged the Attorney General to institute criminal proceedings against a number of stations because of their broadcasting of "give-away" programs similar to those involved here. In response to each letter, the At-

12 F. C. C. v. AMERICAN BROADCASTING CO.

is noteworthy that the Department of Justice has not joined the Commission in appealing the decision below.

It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly.

It is apparent that these so-called "give-away" programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. It unsuccessfully sought to have the Department of Justice take criminal action against them.¹⁷ Likewise, without success, it urged Congress to amend the law to specifically prohibit them.¹⁸ The Commission now seeks to accomplish the

torney General advised that "careful consideration has been given to this matter and it has been concluded that no action is warranted by this Department."

¹⁷ See note 16, *supra*.

¹⁸ In a letter made part of the record below, the Chairman of the Commission in 1943 urged the Senate Interstate Commerce Committee to approve a proposed amendment to § 316 of the Communications Act, later to become § 1304 of the Criminal Code. The proposed amendment would have retained the existing language as to "any lottery, gift enterprise, or similar scheme," but would have extended the prohibition to "any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance." No action was ever taken on the proposal.

same result through agency regulations. In doing so, the Commission has over-stepped the boundaries of interpretation and hence has exceeded its rule-making power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy.¹⁹

The judgments are

Affirmed.

MR. JUSTICE DOUGLAS took no part in the decision of these cases.

¹⁹ Cf. *United States v. Halseth*, 342 U. S. 277, 280-281.